

4-7-2011

# Kinghorn v. Clay Clerk's Record v. 1 Dckt. 38109

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

---

**KRYSTAL M. KINGHORN**

Plaintiff/Respondent

**Vs**

**KELLY N. CLAY**

Defendant/Crossdefendant/Appellant

**BRP, INC.**

Defendant/Crossclaimant/Respondent

**BANK OF COMMERCE**

Defendant/Respondent

---

**Appealed from the District Court of the Seventh Judicial  
District of the State of Idaho, in and For Fremont County  
Honorable Gregory W. Moeller District Judge**

---

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Boise, ID 83702

**Attorney for Defendant/CrossClaimant/Respondent**

**Douglas R. Nelson, Esq.**

PO Box 51630

Idaho Falls, ID 83405

**Attorney for Defendant/Respondent**

---

**38109**

IN THE SUPREME COURT OF THE STATE OF IDAHO

---

Krystal M. Kinghorn  
f/k/a Krystal M. Barrett

Plaintiff(s)/Respondent(s)

Supreme Court No. 38109

Case No. CV2007-306

vs

Kelly N. Clay, an individual  
Defendant/Crossdefendant/Appellant

BRP, Incorporated  
Defendant/Crossclaimant/Respondent

And

Bank of Commerce  
Defendant/Respondent

---

**CLERK'S RECORD ON APPEAL**

Appeal from the District Court of the Seventh Judicial District of the State of Idaho,  
in and for  
THE COUNTY OF FREMONT

GREGORY W. MOELLER  
DISTRICT JUDGE

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Date: 1/4/2011

## Seventh Judicial District Court - Fremont County

User: HARRIGFELD

Time: 09:43 AM

ROA Report

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Case: CV-2007-0000306 Current Judge: Jon J. Shindurling

Krystal M Kinghorn vs. Kelly N Clay, etal.

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date      | Code | User   | Judge  |
|-----------|------|--------|--|
| 5/30/2007 | NEWC | KSTURM | New Case Filed   |
|           |      | KSTURM | Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: E.W. Pike & Associates Receipt number: 0044217 Dated: 5/30/2007 Amount: \$88.00 (Check) For: Kinghorn, Krystal M (plaintiff) |
|           | SMIS | KSTURM | Summons Issued (3)   |
|           | NOTC | KSTURM | Notice of Lis Pendens  |
| 6/1/2007  | AMCO | MACE   | Amended Complaint Filed  |
| 6/6/2007  | AFFD | MACE   | Affidavit OF SERVICE-  |
| 6/19/2007 |      | MACE   | Filing: 11A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: MARK FULLER Receipt number: 0044907 Dated: 6/19/2007 Amount: \$58.00 (Check) For: [NONE]                             |
| 6/22/2007 |      | MACE   | Filing: 12B - Civil Answer Or Appear. >\$300, Not > \$1000 With Prior Appearance Paid by: MARK FULLER Receipt number: 0045010 Dated: 6/22/2007 Amount: \$14.00 (Check) For: [NONE]                       |
| 7/5/2007  |      | MACE   | Filing: 11A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Bradley Dixon Receipt number: 0045389 Dated: 7/6/2007 Amount: \$58.00 (Check) For: [NONE]                            |
| 7/6/2007  | ORDR | MACE   | Order GRANTIN DEFENDANTS MOTION TO DISQ. JUDGE MOSS  |
|           | MISC | MACE   | COPY OF D.Q SENT TO BURTON BUTLER  |
| 7/11/2007 | ORDR | MACE   | Order DIRECTING COPIES OF ALL DOCUMENTS TO BE TRANSMITTED TO THE PRESIDING JUDGE AT HIS CHAMBERS-FILED IN JUDGE SIMPSONS OFFICE 7/11/07  |
|           | ORDR | MACE   | ORDER OF ASSIGNMENT-JUDGE SIMPSON  |
|           | MOTN | MACE   | Motion TO DISQUALIFY   |
|           | NOTC | MACE   | Notice OF SERVICE  |
| 7/13/2007 | MOTN | MACE   | Motion TO DISQUALIFY   |
| 7/19/2007 | NOTC | MACE   | Notice OF INTENT TO TAKE DEFAULT-AGAINST THE BANK OF COMMERCE  |
| 7/20/2007 | NOTC | MACE   | Notice OF SERVICE  |
| 7/25/2007 | NOTC | MACE   | Notice/AMENDED NOTICE OF SERVICE   |
| 7/26/2007 |      | MACE   | Filing: 11A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: DOUGLAS NELSON Receipt number: 0045887 Dated: 7/26/2007 Amount: \$58.00 (Check) For: [NONE]                          |
| 3/3/2007  | NOTC | MACE   | Notice   |
| 3/6/2007  | NOTC | MACE   | Notice OF COMPLIANCE   |

Register of Actions

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date       | Code | User       | Judge  |
|------------|------|------------|--|
| 8/8/2007   | ORDR | MACE       | Order Granting Plaintiffs Motion To Disq. Signed In Chambers By Judge Simpson On Aug. 7th.   |
|            | NOTC | MACE       | Notice OF SERVICE  |
|            |      | MACE       | Filing: I1B - Civil Answer Or Appear. More Than \$1000 With Prior Appearance Paid by: DOUGLAS NELSON Receipt number: 0046162 Dated: 8/8/2007 Amount: \$14.00 (Check) For: [NONE]         |
| 8/13/2007  | ORDR | MACE       | Order OF ASSIGNMENT-JUDGE SHINDERLING  |
| 8/17/2007  | MISC | MACE       | SCHEDULING ORDER-DATE NEEDS RETURNED NOV. 1, 2007  |
| 8/21/2007  | HRSC | MACE       | Hearing Scheduled (Hearing 10/30/2007 02:00 PM) SCHEDULING CONF.   |
| 8/23/2007  | NOTC | MACE       | Notice OF SERVICE OF DOCUMENTS   |
|            | NOTC | MACE       | Notice OF STATUS CONF.   |
|            | MISC | MACE       | CALLED RHONDA-JUDGE SHINDERLINGS CLERK, SHE WILL ARRANGE SCHEDULING CONF AND SEND NOTICE TO ALL COUNSEL. WILL BE IN I.F  |
| 8/27/2007  | NOTC | MACE       | Notice OF INTENT TO APPEAR TELEPHONICALLY  |
|            | MISC | MACE       | REQUEST FOR SCHEDULING CONF.   |
| 8/29/2007  | NOTC | MACE       | Notice OF SERVICE  |
| 9/12/2007  | ORDR | MACE       | Order FOR STATUS CONFERENCE-IN BONNEVILLE COUNTY WITH SHINDULING   |
| 9/21/2007  | NOTC | MACE       | Notice OF RSPD   |
|            | NOTC | MACE       | Notice FIRST SET OF INTEROG.   |
| 10/9/2007  | MINE | HARRIGFELD | Minute Entry   |
| 10/31/2007 | NOTC | HARRIGFELD | Notice of Deposition Duces Tecum/ Margie Fereday on 11/9/2007 at 12:00 pm  |
|            | NOTC | HARRIGFELD | Notice of Deposition Duces Tecum/Krystal M. Kinghorn on 11/9/2007 at 12:00 pm  |
| 11/6/2007  | AFSR | HARRIGFELD | Affidavit of Service/Margie Fereday on 10/30/07  |
| 12/5/2007  | MISC | MACE       | DEPOSITION OF KRYSTAL KINGHORN   |
| 1/14/2008  | HRHD | MACE       | Hearing result for Hearing held on 10/30/2007 02:00 PM: Hearing Held THIS HEARING WILL NOT GO HERE. JUDGE SHINDERLINGS CLERK WILL SET SCHEDULING CONF AND SEND NOTICE FOR HEARING IN I.F |
|            | HRSC | MACE       | Hearing Scheduled (Pre Trial Conference 04/14/2008 10:15 AM) TO BE HELD IN BONNEVILLE COUNTY   |
|            | HRSC | MACE       | Hearing Scheduled (Jury Trial 04/29/2008 09:00 AM)   |

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date      | Code | User       |   | Judge              |
|-----------|------|------------|---|--------------------|
| 1/14/2008 | ORDR | MACE       | Order SETTING PRETRIAL AND JURY TRIAL-SHINDERLING   | Jon J. Shindurling |
| 1/23/2008 | NOTC | HARRIGFELD | Notice of Service   | Jon J. Shindurling |
|           | NOTC | HARRIGFELD | Notice of Service   | Jon J. Shindurling |
| 1/29/2008 | MOTN | HARRIGFELD | Motion for Partial Summary Judgment   | Jon J. Shindurling |
|           | AFFD | HARRIGFELD | Affidavit of Krystal Kinghorn in Support of Motion for Partial Summary Judgment   | Jon J. Shindurling |
|           | MEMO | HARRIGFELD | Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment  | Jon J. Shindurling |
| 1/30/2008 | MISC | HARRIGFELD | Defendant Clay's Expert Witness Disclosure  | Jon J. Shindurling |
|           | MISC | HARRIGFELD | Defendant BRP Incorporated's Expert Witnesses Disclosure  | Jon J. Shindurling |
| 2/1/2008  | MISC | HARRIGFELD | Disclosure of Expert Witness  | Jon J. Shindurling |
| 2/5/2008  | MISC | MACE       | AMENDED DISCLOSURE OF EXPERT WITNESSES  | Jon J. Shindurling |
| 2/8/2008  | MISC | MACE       | MEMORANDUM IN OPPOSITION TO PLAINTIFFS MOTION FOR PARTIAL SUMMAY JUDGMENT AND IN SUPPORT OF BRI'S CROSS MOTION FOR SUMMARY JUDGMENT | Jon J. Shindurling |
|           | MISC | MACE       | BRP'S CROSS MOTION FOR SUMMARY JUDGMENT   | Jon J. Shindurling |
|           | AFFD | MACE       | Affidavit OF BRADLEY DIXON  | Jon J. Shindurling |
|           | AFFD | MACE       | Affidavit OF MARK FULLER  | Jon J. Shindurling |
|           | NOTC | MACE       | Notice OF HEARING ON BRPS CROSS MOTION FOR SUMMARY JUDGMENT   | Jon J. Shindurling |
| 2/11/2008 | STIP | MACE       | Stipulation RE BONNEVILLE COUNTY DISTRICT COURT AS VENUE FOR DISPOSITIVE MOTION HEARINGS  | Jon J. Shindurling |
| 2/12/2008 | NOTC | MACE       | Notice OF HEARING, BONNEVILLE CO. ON MOTION FOR PARTIAL SUMMARY JUDGMENT MARCH 10, 2008 AT 900AM.                                   | Jon J. Shindurling |
| 2/25/2008 | MOTN | MACE       | Motion FOR SUMMARY JUDGMENT   | Jon J. Shindurling |
|           | MISC | MACE       | MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT  | Jon J. Shindurling |
|           | AFFD | MACE       | Affidavit OF NOLAN LEE  | Jon J. Shindurling |
|           | AFFD | MACE       | Affidavit OF BRIAN TUCKER   | Jon J. Shindurling |
|           | NOTC | MACE       | Notice OF HEARING   | Jon J. Shindurling |
| 2/26/2008 | MISC | MACE       | Defendant Clay's Reply To Plaintiffs Motion For Summary Judgment And Brief In Support Of BRP'S Motion For Summary Judgment          | Jon J. Shindurling |
|           | NOTC | MACE       | Notice Of Filing Of Excerpts Of Discovery   | Jon J. Shindurling |
|           | MISC | MACE       | Plaintiffs Answer To Defendant Clay's First Set Of Requests For Admission   | Jon J. Shindurling |

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date      | Code | User |  | Judge              |
|-----------|------|------|--|--------------------|
| 3/4/2008  | MISC | MACE | PLAINTIFFS S=REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMM. JUDGMENT AND OPPOSITION TO BRPS CROSS MOTION FOR SUMMARY JUDGMENT | Jon J. Shindurling |
| 3/5/2008  | NOTC | MACE | Notice OF HEARING-IN IDAHO FALLS   | Jon J. Shindurling |
|           | MISC | MACE | DEFENDANT CLAY'S MOTION FOR SUMMARY JUDGMENT   | Jon J. Shindurling |
|           | NOTC | MACE | Notice OF FILING OF DISCOVERY EXCERPTS   | Jon J. Shindurling |
|           | MISC | MACE | PLAINTIFFS ANSWERS TO DEF. KELLY CLAY'S FIRST SET OF REQUESTS FOR ADMISSION  | Jon J. Shindurling |
|           | MISC | MACE | BRIEF IN SUPPORT OF DEF CLAY'S MOTION FOR SUMMARY JUDGMENT   | Jon J. Shindurling |
| 3/6/2008  | AFFD | MACE | Affidavit OF JENNIFER M. REINHARDT IN SUPPORT OF BRP'S RESPONSE TO KINGHORN'S OPPOSITION TO BRP CORSS MOTION FOR SUMMARY JUDGMENT      | Jon J. Shindurling |
|           | MISC | MACE | BRP'S RESPONSE TO KINGHORN'S OPPOSITION TO BRP'S CROSS MOTION FOR SUMMARY JUDGMENT   | Jon J. Shindurling |
| 3/11/2008 | MOTN | MACE | Motion TO SHORTEN TIME   | Jon J. Shindurling |
|           | MOTN | MACE | Motion FOR CONTINUANCE OF HEARING  | Jon J. Shindurling |
| 3/13/2008 | MISC | MACE | PLAINTIFFS MEMORANDUM IN RESPONSE TO THE BANK OF COMMERCES MOTION FOR SUMMARY JUDGMENT   | Jon J. Shindurling |
| 3/19/2008 | MISC | MACE | PLAINTIFFS RESPONSE MEMORANDUM TO DEF KELLY CLAYS MOTION FRO SUMMARY JUDGMENT  | Jon J. Shindurling |
| 3/21/2008 | NOTC | MACE | Notice OF SERVICE  | Jon J. Shindurling |
| 3/25/2008 | MOTN | MACE | Motion TO VACATE HEARING   | Jon J. Shindurling |
|           | MISC | MACE | REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT   | Jon J. Shindurling |
| 4/2/2008  | MISC | MACE | NOTICE OF TAKING DEPOSITION OF KELLY CLAY, DOYLE BECK AND MARK FULLER  | Jon J. Shindurling |
| 4/18/2008 | MISC | MACE | MEDIATION STATUS REPORT-IMPASSE  | Jon J. Shindurling |
| 4/1/2008  | MISC | MACE | REQUEST FOR ENTRY UPON LAND  | Jon J. Shindurling |
| 4/30/2008 | MISC | MACE | OPINION, DECISION AND ORDER ON DEF BANK OF COMMERCES MOTON FOR SUMMARY JUDGMENT- FILED IN JUDGE SHINDURLING'S CHAMBERS ON MAY 30, 2008 | Jon J. Shindurling |
| 4/3/2008  | ORDR | MACE | Order RE SETTING PRETRIAL NAD JURY TRIAL-FILED IN CHAMBERS-JUDGE SHINDURLING.  | Jon J. Shindurling |
| 4/4/2008  | HRVC | MACE | Hearing result for Jury Trial held on 04/29/2008 09:00 AM: Hearing Vacated   | Jon J. Shindurling |

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date      | Code | User       | Judge  |
|-----------|------|------------|--|
| 6/4/2008  | HRVC | MACE       | Hearing result for Pre Trial Conference held on 04/14/2008 10:15 AM: Hearing Vacated TO BE HELD IN BONNEVILLE COUNTY Jon J. Shindurling  |
|           | HRSC | MACE       | Hearing Scheduled (Pre Trial Conference 01/12/2009 10:00 AM) TO BE HELD IN BONNEVILLE COUNTY Jon J. Shindurling  |
|           | HRSC | MACE       | Hearing Scheduled (Jury Trial 01/26/2009 09:00 AM) Jon J. Shindurling  |
| 6/24/2008 | AFFD | MACE       | Affidavit OF BRIAN T. TUCKER IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY FEES AND COSTS Jon J. Shindurling  |
|           | MISC | MACE       | MEMORANDUM OF FEES AND COSTS Jon J. Shindurling  |
|           | MOTN | MACE       | Motion FOR FEES AND COSTS Jon J. Shindurling   |
|           | ORDR | MACE       | Order AND JUDGMENT FOR POST JUDGMENT ATTORNEY FEES AND COSTS Jon J. Shindurling  |
| 6/30/2008 | MISC | MACE       | BRIEF IN OBJECTION TO MOTION FOR AWARD OF ATTN. FEES Jon J. Shindurling  |
|           | MOTN | MACE       | Motion TO RECONSIDER Jon J. Shindurling  |
|           | MISC | MACE       | PAPERWORK FAXED TO JUDGE SHINDURLING. JUDGE MOSS SIGNED IN ERROR Jon J. Shindurling  |
| 7/11/2008 | HRVC | MACE       | Hearing result for Jury Trial held on 01/26/2009 09:00 AM: Hearing Vacated Jon J. Shindurling  |
|           | HRVC | MACE       | Hearing result for Pre Trial Conference held on 01/12/2009 10:00 AM: Hearing Vacated TO BE HELD IN BONNEVILLE COUNTY Jon J. Shindurling  |
|           | HRSC | MACE       | Hearing Scheduled (Pre Trial Conference 01/12/2009 10:15 AM) PRETRIAL TO BE IN BONNEVILLE CO Jon J. Shindurling  |
|           | HRSC | MACE       | Hearing Scheduled (Jury Trial 02/02/2009 01:30 PM) Jon J. Shindurling  |
|           | APLS | HARRIGFELD | Appeal to Supreme Court Jon J. Shindurling   |
| 7/14/2008 |      | HARRIGFELD | Filing: T - Civil Appeals To The Supreme Court (\$86.00 for the Supreme Court to be receipted via Misc. Payments. The \$15.00 County District Court fee to be inserted here.) Paid by: E.W. Pike & Associates Receipt number: 0053895 Dated: 7/14/2008 Amount: \$15.00 (Check) For: Kinghorn, Krystal M (plaintiff) Jon J. Shindurling |
|           |      | HARRIGFELD | Miscellaneous Payment: Supreme Court Appeal Fee (Please insert case #) Paid by: E.W. Pike & Associates Receipt number: 0053896 Dated: 7/14/2008 Amount: \$86.00 (Check) Jon J. Shindurling   |
| 7/16/2008 | BNDC | HARRIGFELD | Bond Posted - Cash (Receipt 54003 Dated 7/16/2008 for 100.00) Jon J. Shindurling   |
|           | BONC | HARRIGFELD | Condition of Bond Deposit for Clerks Record on Appeal Jon J. Shindurling   |

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date       | Code | User       | Judge   |
|------------|------|------------|---|
| 7/25/2008  | HRSC | MACE       | Hearing Scheduled (Hearing 08/25/2008 11:30 AM) HEARING ON MOTION FOR FEES AND COSTS.-IN BONNEVILLE COUNTY Jon J. Shindurling                                 |
| 7/28/2008  | MISC | HARRIGFELD | Filing of Clerk's Certificate - Idaho Court of Appeals - Docket #35504 Jon J. Shindurling   |
|            | MISC | HARRIGFELD | Clerk's Record/Reporter's Transcript - Suspended for DC Order Re: Motion to Reconsider Jon J. Shindurling   |
|            | MISC | HARRIGFELD | Notice of Appeal received by Idaho Court of Appeals - Clerk's Record due 9/30/2008 Jon J. Shindurling   |
| 8/12/2008  | HRVC | MACE       | Hearing result for Hearing held on 08/25/2008 11:30 AM: Hearing Vacated HEARING ON MOTION FOR FEES AND COSTS.-IN BONNEVILLE COUNTY Jon J. Shindurling         |
|            | NOTC | MACE       | Notice Vacating Hearing Jon J. Shindurling  |
| 8/22/2008  | ORDR | MACE       | Order-Opinion, Decision And Order On Parties Motion For Summary Judgment. Filed In Chambers Aug. 22 received Aug. 26, 2008 Jon J. Shindurling                 |
| 9/10/2008  | ORDR | HARRIGFELD | Order Granting the Stipulation to Dismiss the Appeal. Jon J. Shindurling  |
| 9/18/2008  | MISC | HARRIGFELD | Remittitur - Appeal is DISMISSED Jon J. Shindurling   |
| 9/19/2008  | BNDE | HARRIGFELD | Cash Bond Exonerated (Amount 100.00) Jon J. Shindurling   |
| 9/23/2008  | MOTN | MACE       | Motion For Leave Of Court To File An Amendment To The Amended Complaint Jon J. Shindurling  |
| 9/30/2008  | NOTC | MACE       | Notice Of Hearing-11-3-08, 11:30 P.M in Bonneville County Jon J. Shindurling  |
|            | AFFD | MACE       | Affidavit Of Kelly Clay Jon J. Shindurling  |
|            | AFFD | MACE       | Affidavit Of Doyle Beck Jon J. Shindurling  |
|            | AFFD | MACE       | Affidavit Of Bryan Smith Jon J. Shindurling   |
|            | MOTN | MACE       | Motion For Reconsideration Or Alternatively Summary Judgment Jon J. Shindurling   |
|            | MISC | MACE       | Brief In Support Of Motion For Reconsideration Or Alternatively Summary Judgment Jon J. Shindurling   |
| 10/7/2008  | AFFD | MACE       | Affidavit Of Krystal Kinghorn Jon J. Shindurling  |
|            | NOTC | MACE       | Notice Jon J. Shindurling   |
|            | MISC | MACE       | Plaintiffs Second Motion For Partial Summary Judgment Jon J. Shindurling  |
|            | MISC | MACE       | Plaintiffs Memorandum In Support Of Second Motion For Partial Summary Judgment Jon J. Shindurling   |
| 10/10/2008 | LETT | HARRIGFELD | Letter from T&T Reporting regarding Transcript Jon J. Shindurling   |
| 10/23/2008 | MISC | MACE       | BRP's Second Cross Motion For Summary Judgment Jon J. Shindurling   |
|            | MISC | MACE       | Memorandum In Opposition To Plaintiffs Second Motion For Summary Judgment And In Support Of BRP's Second Cross Motion For Summary Judgment Jon J. Shindurling |

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date       | Code | User |  | Judge              |
|------------|------|------|--|--------------------|
| 10/23/2008 | MISC | MACE | Plaintiffs Memor. In Opposition To Def Clays Motion For Reconsideration  | Jon J. Shindurling |
|            | AFFD | MACE | Affidavit Of Margie Fereday In Objection To Clays Motion For Recons.   | Jon J. Shindurling |
|            | AFFD | MACE | Affidavit Of Krystal Kinghorn In Objection To Clays Motion   | Jon J. Shindurling |
|            | AFFD | MACE | Affidavit Of Jennifer Reinhardt  | Jon J. Shindurling |
| 10/24/2008 | NOTC | MACE | Notice   | Jon J. Shindurling |
|            | HRSC | MACE | Hearing Scheduled (Hearing 11/03/2008 11:30 AM) Motion On Summary Judgment-In Bonneville Co  | Jon J. Shindurling |
| 10/28/2008 | MISC | MACE | BRP Incorporated Response To Plaintiffs Motion To File Amendment To Amend Complaint  | Jon J. Shindurling |
|            | MISC | MACE | Plaintiffs Reply Memor. In Support Of Second Motion For Summary Judgment And In Opposition To BRP'S Second Cross Motion For Summary Judgment | Jon J. Shindurling |
| 10/29/2008 | MISC | MACE | Reply Brief In Support Of Motion For Reconsideration Or Altern. Summary Judgment   | Jon J. Shindurling |
| 11/4/2008  | MINE | MACE | Minute Entry-Filed In Chambers This Date.  | Jon J. Shindurling |
| 11/5/2008  | MISC | MACE | Plaintiffs Second Amended Disclosure of Expert Witnesses   | Jon J. Shindurling |
| 11/12/2008 | ORDR | MACE | Order Granting Plaintiffs Motion To Amend The Amended Complaint  | Jon J. Shindurling |
| 11/18/2008 | NOTC | MACE | Notice Of Service Of BRP Second Set Of Interog. To Plaintiff Krystal Kinghorn  | Jon J. Shindurling |
|            | NOTC | MACE | Notice Of Service Of BRP, Second Set Of Request For Production Of Documents To Plaintiff Kinghorn  | Jon J. Shindurling |
| 12/19/2008 | NOTC | MACE | Notice Of Service  | Jon J. Shindurling |
| 1/13/2009  | NOTC | MACE | Notice Of Time For Status Conf.-May 11, 2009 at 9:30 In Bonn   | Jon J. Shindurling |
|            | MISC | MACE | Opinion, Decision And Order On Plaintiffs Motin For Summary Judgment And Def Clays Motion To Reconsider                                      | Jon J. Shindurling |
|            | MISC | MACE | BRP's Incorp. Objection To Plaintiffs Motion For Award Of Attorney Fees And Costs.   | Jon J. Shindurling |
| 1/28/2009  | HRVC | MACE | Hearing result for Jury Trial held on 02/02/2009 01:30 PM: Hearing Vacated   | Jon J. Shindurling |
|            | HRVC | MACE | Hearing result for Pre Trial Conference held on 01/12/2009 10:15 AM: Hearing Vacated<br>PRETRIAL TO BE IN BONNEVILLE CO                      | Jon J. Shindurling |
| 2/2/2009   | MOTN | MACE | Motion For Award Of Attorney Fees And Costs  | Jon J. Shindurling |
|            | AFFD | MACE | Affidavit Of Alan Johnston In Support Of Motion For Award Of Attorney Fees And Costs.  | Jon J. Shindurling |



Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date       | Code | User       |   | Judge              |
|------------|------|------------|---|--------------------|
| 2/10/2009  | MISC | MACE       | Objection To Plaintiffs Motion For Award Of Attorney Fees And Costs   | Jon J. Shindurling |
| 4/29/2009  | NOTC | MACE       | Notice Of Time For Status Conf. May 12th 930 In Bonneville Co   | Jon J. Shindurling |
| 5/20/2009  | MINE | MACE       | Minute Entry- Status Conf.  | Jon J. Shindurling |
| 8/11/2009  | STIP | MACE       | Stipulation   | Jon J. Shindurling |
| 8/26/2009  | MINE | HARRIGFELD | Minute Entry - Status Conference  | Jon J. Shindurling |
|            | HRSC | HARRIGFELD | Hearing Scheduled (Hearing 11/09/2009 11:00 AM) Motion on Summary Judgment to be held in Bonneville County  | Jon J. Shindurling |
| 9/11/2009  | ORDR | MACE       | Order-Filed In Judge Shindurling's Chambers Sept. 9-09  | Jon J. Shindurling |
| 9/22/2009  | MISC | MACE       | BRP, Incs Cross Claim Against Kelly Clay For Breach Of The Warranty Deed  | Jon J. Shindurling |
| 10/2/2009  | MISC | MACE       | Reply To BRP, Inc's Cross Claim Against Kelly Clay For Breach Of The Warranty Deed  | Jon J. Shindurling |
| 10/16/2009 | NOTC | MACE       | Notice Of Hearing-Motion For Summary Judgment In Bonn Co. Nov. 9,2009 at 11:00 a.m  | Jon J. Shindurling |
|            | MISC | MACE       | Brief In Support Of Motion For Summary Judgment   | Jon J. Shindurling |
|            | AFFD | MACE       | Affidavit Of Bryan Smith  | Jon J. Shindurling |
|            | MOTN | MACE       | Motion For Summary Judgment   | Jon J. Shindurling |
|            | MISC | MACE       | Memorandum Of Attorney Fees   | Jon J. Shindurling |
|            | MISC | MACE       | Brief In Support Of Objection To Plaintiffs Motion For Award Of Attorney Fees And Costs.  | Jon J. Shindurling |
| 10/21/2009 | AFFD | MACE       | Affidavit Of Doyle Beck   | Jon J. Shindurling |
|            | MOTN | MACE       | Motion For Summary Judgment Re: BRP's Cross Claim Against Kelly Clay For Breach Of Warranty Deed  | Jon J. Shindurling |
|            | MISC | MACE       | Memorandum In Support Of Motion For Summary Judgment Re: BRP's Cross Claim Against Kelly Clay For Breach Of The Warranty Deed                                     | Jon J. Shindurling |
|            | NOTC | MACE       | Notice Of Non Opposition To Motion For Summary Judgment Re: BRP's Cross Claim Against Kelly Clay For The Breach Of Warranty Deed                                  | Jon J. Shindurling |
| 10/23/2009 | MISC | MACE       | Notice Of Hearing On BRP'S Motion For Summary Judgment Re: Cross Claim Against Kelly Clay For Breach Of Contract. To Be In Bonn Co Dec 7th at 11:00 a.m           | Jon J. Shindurling |
| 10/27/2009 | MISC | MACE       | Plaintiffs Cross Motion For Summary Judgment  | Jon J. Shindurling |
|            | AFFD | MACE       | Affidavit Of Brett Whitaker   | Jon J. Shindurling |
|            | MISC | MACE       | Plaintiffs Memorandum In Support Of Plaintiffs Cross Motion For Summary Judgment And Response In Opposition To Defendant Kelly Clay's Motion For Summary Judgment | Jon J. Shindurling |

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date       | Code | User | Judge   |
|------------|------|------|---|
| 10/27/2009 | NOTC | MACE | Notice-Amended Notice Of Hearing- Bonneville Co Courthouse-Dec 8th, 2009 at 1:30pm for Hearing On Motions Jon J. Shindurling  |
| 11/2/2009  | NOTC | MACE | Notice-Amended Notice Of Hearing-BRP's Motion For Summary Judgment Jon J. Shindurling   |
| 11/6/2009  | HRVC | MACE | Hearing result for Hearing held on 11/03/2008 11:30 AM: Hearing Vacated Motion On Summary Judgment-In Bonneville Co Jon J. Shindurling                                    |
|            | CONT | MACE | Hearing result for Hearing held on 11/09/2009 11:00 AM: Continued Motion on Summary Judgment to be held in Bonneville County Jon J. Shindurling                           |
|            | HRSC | MACE | Hearing Scheduled (Hearing 12/08/2009 01:30 PM) In Bonneville Co. Jon J. Shindurling  |
| 12/4/2009  | AFFD | MACE | Affidavit Of Bryan N. Zollinger Jon J. Shindurling  |
|            | MISC | MACE | Objection To Plaintiffs Cross Motion For Summary Judgment And Reply Brief In Support Of Clay's Motion For Summary Judgment Jon J. Shindurling                             |
|            | MISC | MACE | Brief In Support Of Motion To Strike Expert Witness Affd. Jon J. Shindurling  |
| 12/9/2009  | MINE | MACE | Minute Entry-Filed In Chambers 12-8-09 Jon J. Shindurling   |
| 1/26/2010  | ORDR | MACE | Order-Filed In Chambers-Opinion, Decision, and Order On Motions For Summary Judgment and Defendant Clay's Motion To Strike Jon J. Shindurling                             |
| 1/27/2010  | HRHD | MACE | Hearing result for Hearing held on 12/08/2009 01:30 PM: Hearing Held In Bonneville Co. Jon J. Shindurling   |
| 2/22/2010  | PETN | MACE | Petition For Fees And Costs Jon J. Shindurling  |
|            | MISC | MACE | Memorandum In Suport Of Petition For Fees And Costs Jon J. Shindurling  |
|            | AFFD | MACE | Affidavit Of Brdadley J. Dixon In Support Of Petittion For Fees And Costs Jon J. Shindurling  |
|            | AFFD | MACE | Affidavit Of Bradley J. Dixon- Re; Amounts Due On Judgment Jon J. Shindurling   |
| 3/9/2010   | MOTN | MACE | Motion To Disallow Costs And Fees And Objection To Request For Amounts Due On Judgment Jon J. Shindurling   |
|            | MISC | MACE | Brief In Support Of Motion To Disallow Costs And Fees Jon J. Shindurling  |
| 3/17/2010  | NOTC | MACE | Notice Of Hearing. Jon J. Shindurling   |
|            | AFFD | MACE | Affidavit Of Bradley Dixon In Support Of BRP'S Opposition To Clay's Motion To Disallow Costs And Fees And Objection To Req. For Amount Due On Judgment Jon J. Shindurling |
|            | MISC | MACE | BRP'S Memorandum In Opposition To Kelly Clay's Motion To Disallow Costs And Fees And Objection To Request For Amounts Due On Judgment Jon J. Shindurling                  |

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date      | Code | User |   | Judge              |
|-----------|------|------|---|--------------------|
| 3/29/2010 | MISC | MACE | Reply Brief In Support Of Motion To Disallow Costs And Fees And Objection To Request For Amounts Due On Judgment  | Jon J. Shindurling |
| 3/31/2010 | MINE | MACE | Minute Entry- File In Chambers-Motion To Disallow Fees. The Court Will Make Ruling In Due Time  | Jon J. Shindurling |
| 4/2/2010  | MOTN | MACE | Motion For Leave Of Court To File A Second Amended Complaint  | Jon J. Shindurling |
|           | NOTC | MACE | Notice Of Hearing   | Jon J. Shindurling |
| 4/5/2010  | MISC | MACE | Supplemental Brief in Support Of Motion To Disallow Costs And Fees And Objection To Request For Amounts Due On Judgment   | Jon J. Shindurling |
| 4/7/2010  | MISC | MACE | BRP'S Response To Supplemental Brief In Support Of Motion To Disallow Costs And Fees And Objection For Amounts Due On Judgment  | Jon J. Shindurling |
| 4/13/2010 | MISC | MACE | BRP'S Opposition To Plaintiffs Motion For Leave To File Second Amended Complaint  | Jon J. Shindurling |
| 5/4/2010  | ORDR | MACE | Order-Opinion, Decision, And Order On Clay's Motion To Disallow Costs And Fees And Objection To Request For Amounts Due On Judgment-Filed In Chambers 5-4-10                | Jon J. Shindurling |
|           | MISC | MACE | Conclusion-BRP Granted Reasonable Fees  | Jon J. Shindurling |
|           | MINE | MACE | Minute Entry  | Jon J. Shindurling |
| 5/28/2010 | JDMT | MACE | Judgment-Final Judgment RE: Cross Claim Filed In Chambers   | Jon J. Shindurling |
| 3/8/2010  | JDMT | MACE | Judgment (Proposed) Final Judgment Re. Cross Claim-Filed In Chambers  | Jon J. Shindurling |
| 3/9/2010  | PETN | MACE | Petition For Writ Of Attachment   | Jon J. Shindurling |
|           | AFFD | MACE | Affidavit Of Bradley J. Dixon In Support Of BRP INC'S Petition For Writ Of Attachment   | Jon J. Shindurling |
| 3/11/2010 | ORDR | MACE | Order On Stipulation-Filed In Chambers  | Jon J. Shindurling |
|           | NOTC | MACE | Notice Of Hearing-Bonn Co. July 19, 2010 On Petition For Writ Of Attachment   | Jon J. Shindurling |
|           | ORDR | MACE | Order On Stipulation-Filed In Chambers  | Jon J. Shindurling |
| 3/14/2010 |      | MACE | Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Stoel Rives Receipt number: 0068463 Dated: 6/14/2010 Amount: \$2.00 (Check) | Jon J. Shindurling |
| 7/2/2010  | HRSC | MACE | Hearing Scheduled (Hearing 07/19/2010 11:00 AM) In Bonneville County. Defendants Motion For Order To Perfect Attorney Fees  | Jon J. Shindurling |
|           | NOTC | MACE | Notice Of Hearing   | Jon J. Shindurling |
|           | MISC | MACE | Memorandum Of Attorney Fees   | Jon J. Shindurling |
|           | MISC | MACE | Brief Opposing Petition For Writ Of Attachment  | Jon J. Shindurling |
|           | MISC | MACE | Brief In Support Of The Motion For Order To Perfect Attorney Fees Lien  | Jon J. Shindurling |

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date       | Code | User       |   | Judge              |
|------------|------|------------|---|--------------------|
| 7/2/2010   | MOTN | MACE       | Motion For Order To Perfect Attorney Fees Lien  | Jon J. Shindurling |
|            | AFFD | MACE       | Affidavit Of Bryan D. Smith In Support Of Motion For Order Determining Attorney Fees  | Jon J. Shindurling |
| 7/15/2010  | MISC | MACE       | Memorandum In Support Of Petition For Attachment And In Opposition To Motion To Perfect Attorney Fee Lien   | Jon J. Shindurling |
| 7/19/2010  | MISC | MACE       | Supplemental Brief Opposing Petition For Writ Of Attachment   | Jon J. Shindurling |
|            | MINE | MACE       | Minute Entry Filed In Chambers 7-19-10  | Jon J. Shindurling |
| 7/21/2010  | BNDG | MACE       | Bond Posted - Cash (Receipt 69171 Dated 7/21/2010 for 22235.33)   | Jon J. Shindurling |
|            | BONG | MACE       | Condition of Bond Funds For Redemption Of Property To Be Held By The Court Until Judge Shinderling Determines Where It Goes   | Jon J. Shindurling |
| 9/1/2010   | ORDR | MACE       | Order-Opinion,Decision,And Order On Attorney Brian Smith's Motion To Perfect Attorney Fees Lien-- Filed In Judge Shindurlings Chambers September 1, 2010  | Jon J. Shindurling |
| 9/2/2010   | MISC | MACE       | Per Judge's Order Release Bond To BRP.  | Jon J. Shindurling |
|            | BONG | MACE       | Condition of Bond Funds For Redemption Of Property To Be Held By The Court Until Judge Shinderling Determines Where It Goes-Per Order Of Judge Shindurling 9-1-2010 Money Is To Be Released To BRP. Attn. Bradley Dixon. Done On 9-2-2010 | Jon J. Shindurling |
|            | HRVC | MACE       | Hearing result for Hearing held on 07/19/2010 11:00 AM: Hearing Vacated In Bonneville County. Defendants Motion For Order To Perfect Attorney Fees  | Jon J. Shindurling |
|            | BNDV | MACE       | Bond Converted (Transaction number 6971 dated 9/2/2010 amount 22,235.33)  | Jon J. Shindurling |
| 9/27/2010  |      | MACE       | Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Bryan D. Smith Receipt number: 0070473 Dated: 9/27/2010 Amount: \$101.00 (Check) For: Clay, Kelly N (defendant)   | Jon J. Shindurling |
|            | BNDG | MACE       | Bond Posted - Cash (Receipt 70474 Dated 9/27/2010 for 100.00)   | Jon J. Shindurling |
|            | BONG | MACE       | Condition of Bond Check For Preparation Of Clerks Record  | Jon J. Shindurling |
|            | MOTN | MACE       | Motion For Rule 54(b)   | Jon J. Shindurling |
| 9/29/2010  | NOTC | MACE       | Notice Of Hearing   | Jon J. Shindurling |
| 9/30/2010  | MISC | HARRIGFELD | Clerks Certificate of Appeal sent to Idaho Supreme Court  | Jon J. Shindurling |
| 10/12/2010 | ORDR | HARRIGFELD | Order Suspending Appeal - Entry of Final Order  | Jon J. Shindurling |
| 10/26/2010 | MINE | MACE       | Minute Entry  | Jon J. Shindurling |

Krystal M Kinghorn vs. Kelly N Clay, BRP Incorporated, Bank Of Commerce

| Date       | Code | User       |  | Judge              |
|------------|------|------------|--|--------------------|
| 10/26/2010 | MISC | MACE       | Rule 54(b) Certificate-Bryan Smith Is Not Allowed Attorney Fee Lien Under 3-205- Filed In Chambers 10-25-10            | Jon J. Shindurling |
| 10/27/2010 | MISC | HARRIGFELD | Clerk's Certificate Filed  | Jon J. Shindurling |
| 10/29/2010 | AMEN | HARRIGFELD | Amended Notice of Appeal   | Jon J. Shindurling |
| 11/12/2010 | MISC | HARRIGFELD | CLERK'S RECORD DUE ON OR BEFORE 1/11/11  | Jon J. Shindurling |
|            | NOTC | HARRIGFELD | Amended Notice of Appeal received by Court of Appeals on 11/4/10   | Jon J. Shindurling |
| 11/18/2010 | MISC | MACE       | Memorandum In Support Of Motion For Summary Judgment Re: Plaintiffs Claim For Waste                                    | Jon J. Shindurling |
|            | AFFD | MACE       | Affidavit Of Jennifer M. Reinhardt In Support Of BRP, INC'S Motion For Summary Judgment Re: Plaintiffs Claim For Waste | Jon J. Shindurling |
|            | MOTN | MACE       | Motion For Summary Judgment Re: Plaintiffs Claim For Waste   | Jon J. Shindurling |
|            | NOTC | MACE       | Notice Of Hearing- Jan. 31, 2011 In Bonneville County  | Jon J. Shindurling |
| 12/1/2010  | MISC | MACE       | Transcript Filed   | Jon J. Shindurling |

E.W. Pike (ISB 650)  
Erika Lessing (ISB 6797)  
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Idaho Falls, ID 83403-2949  
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Telefax: 208/528-6447

District Seven Court  
County of Fremont  
State of Idaho

Date: 5-30-07  
Time: 9:10Am  
Clerk: Shie Mace, Clerk  
Deputy Clerk: KS

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

vs.

KELLY N. CLAY, an individual,  
BRP, INCORPORATED, an Idaho  
corporation, and THE BANK OF  
COMMERCE, an Idaho Banking  
corporation,

Defendants.

Case No. CV-07-304

**COMPLAINT**

Plaintiff Krystal M. Kinghorn f/k/a Krystal M. Barrett ("Krystal"), through her attorneys,  
complains of Defendants as follows:

**JURISDICTION**

1. Krystal is a resident of the State of Idaho, and has so resided during all times material hereto.
2. Defendant Kelly Clay ("Clay") is an individual residing in Bonneville County, Idaho.
3. Defendant BRP, Incorporated ("BRP") is an Idaho corporation.

4. Defendant The Bank of Commerce ("Bank") is an Idaho banking corporation with its principal place of business located in Idaho Falls, Idaho.

5. The real property at issue herein is located in Fremont County, Idaho.

6. Jurisdiction is proper in the District Court of the Seventh Judicial District, Fremont County, Idaho.

### **GENERAL ALLEGATIONS**

7. On or about May 12, 2000, Krystal purchased real property located at Lot 15, Block 6, Buffalo River Estates Division No. 2, Fremont County, Idaho (more particularly described on Exhibit "A," annexed hereto) ("the Property") from Tom and Raeona Nugent.

8. The Property was conveyed by Warranty Deed to Krystal and her husband, Todd D. Barrett. *See* Exhibit "A," annexed hereto.

9. Thereafter, on or about August 29, 2005, Todd D. Barrett executed a Quitclaim Deed in favor of Krystal on the Property, which was duly recorded in the records of Fremont County as Instrument No. 463121.

10. In the fall of 2005, Krystal and her then-husband, Todd D. Barrett, were involved in divorce proceedings.

11. By reason thereof, Krystal was in desperate financial circumstances, and was in a fragile emotional condition.

12. Krystal and Clay were good friends in the fall of 2005.

13. Krystal confided in Clay, and he was aware of Krystal's desperate financial circumstances and emotionally fragile condition.

14. On or about November 30, 2005 Krystal made application to the Bank for a \$20,000.00 loan, and agreed to pledge the Property, together with a mobile home located on the

Property, as security for said loan.

15. At that time, Krystal owned the Property, free and clear of encumbrances.

16. The Property was worth approximately \$80,000.00 at that time.

17. The Bank required a co-signator for the loan, in addition to a Deed of Trust on the Property.

18. Krystal discussed her difficulty in obtaining the loan with Clay and Clay offered to co-sign on the loan.

19. Clay represented to Krystal that he wanted to help her, and that he was willing to make one or two payments on the loan if she was unable to do so, and that she could pay him back over time.

20. Clay caused documents to be prepared, including a Loan Guarantee Agreement, a Deed of Trust in his favor and a Quitclaim Deed. *See* Exhibit "B," annexed hereto.

21. The documents were prepared by Clay's attorney, Mark Fuller. Krystal was not represented by counsel.

22. On or about December 13, 2005, Krystal went to the Bank and executed the Bank loan documents (annexed hereto as Exhibit "C") and the documents prepared by Clay's attorney.

23. Among the documents executed by Krystal on December 13, 2005, was a Deed of Trust in favor of the Bank.<sup>1</sup> The Deed of Trust lists, as Grantors, Krystal M. Barrett and Kelly N. Clay, notwithstanding the fact that Krystal was the sole owner of the property and Clay had no interest or title to said property. Krystal and Clay both executed the Deed of Trust as Grantors. *See* Exhibit "C," annexed hereto.

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<sup>1</sup> The Deed of Trust is dated December 13, 2005, and acknowledged December 7, 2005; however, Krystal did not go to the Bank until December 13, 2005, and all documents were executed on that date.



24. Krystal received the sum of \$20,477.00 as proceeds from the loan. Nolan Lee, an officer of the Bank, represented to Krystal that the documents she was signing constituted a standard loan package. He did not advise Krystal to seek legal counsel before signing the documents prepared by Clay's attorney, nor did he explain the documents to Krystal.

25. Nolan Lee notarized Krystal's signature on all documents she signed in connection with the transaction, including documents prepared by Clay's attorney, Mark Fuller.

26. At no time did Krystal intend to absolutely convey her interest in the Property to Clay.

27. For a period of approximately one year, Krystal made installment payments of \$270.25 on the loan to the Bank. Said payments were due on the 25<sup>th</sup> day of each month, with a 15-day grace period.

28. On or about March 2, 2007, Nolan Lee sent written notice to Clay that Krystal had missed two payments on her loan with the Bank. At that time, Krystal was within the 15-day grace period for the February payment. *See* Exhibit "D," annexed hereto.

29. Nolan Lee did not send notice to Krystal of the missed payment(s), nor did he send a copy of his letter to Clay to Krystal.

30. On or about March 8, 2007, Clay voluntarily paid two payments to the Bank. The February payment was not yet outside the 15-day grace period at the time Clay made his voluntary payment.

31. Clay did not inform Krystal that he had received notice of the missed payment(s) from the Bank, or that he was paying the missed payment(s) to the Bank.

32. On or about March 9, 2007, Clay recorded the Quitclaim Deed on the Property executed by Krystal on December 13, 2005.

33. Clay did not give Krystal notice that he had recorded the Quitclaim Deed.
34. On or about May 3, 2007, Clay sold the Property to BRP.
35. Clay had a business relationship with one of the officers of BRP, Doyle Beck.
36. Mark Fuller, who acted as Clay's attorney at all times material hereto, is the statutory registered agent for BRP.
37. Clay did not give Krystal notice that he sold the Property to BRP.

### **COUNT I – MORTGAGE AND REDEMPTION**

38. Krystal re-alleges paragraphs 1-37 set forth above.
39. That on the 13<sup>th</sup> day of December, 2005, Krystal, to secure the co-signature of Clay on a certain note given by Krystal and Clay to the Bank, executed and delivered to Clay a Quitclaim Deed to real property located in Fremont County. *See* Exhibit "B," annexed hereto.
40. Krystal was then the owner and in possession of the real property, located in Fremont County, and particularly described in Exhibit "A."
41. That the Quitclaim Deed, although absolute in form, was intended by both Krystal and Clay to be a mortgage only, and to stand as security for the repayment of said loan, and to serve no other purpose. *See* Loan Guarantee Agreement, Exhibit "B."
42. The note given by Krystal and co-executed by Clay to the Bank was for the principal sum of \$20,477.00.
43. At the time said note was given, the real property owned by Krystal and which is the subject of this action, was worth approximately \$80,000.00.
44. At the time said note was given, there were no other encumbrances on the Property.
45. At the time said note was given, Krystal was in desperate financial circumstances,

and Clay encouraged Krystal to enter into the subject transaction. Krystal acquiesced because of her necessitous condition.

46. The Loan Guarantee Agreement represents that the Quitclaim Deed was given to secure Clay's position as a co-signor on the loan to the Bank.

47. Clay, through his attorney, Mark Fuller, caused the Quitclaim Deed to be recorded in the office of the recorder of deeds of Fremont County on March 9, 2007.

48. Krystal is ready to pay whatever may be justly due on said loan, and hereby offers to bring the money into court for that purpose.

### **COUNT II – CONSTRUCTIVE TRUST**

49. Krystal re-alleges paragraphs number 1-48 set forth above.

50. Clay obtained title to the Property through fraud, misrepresentations, and under circumstances rendering it unconscionable for Clay to retain title to the Property.

51. Clay has an equitable and legal duty to reconvey the Property to Krystal upon repayment of the loan amounts he has advanced.

52. Clay would be unjustly enriched if her were permitted to retain the Property.

53. Clay stood in a confidential relationship to Krystal, and breached that relationship.

54. A constructive trust should be imposed.

### **COUNT III - INVALID TRANSFER**

55. Krystal re-alleges paragraphs 1-54 set forth above.

56. That on or about May 3, 2007, Clay sold the real property to BRP, notwithstanding Krystal's right of redemption on the Property.

57. Krystal is informed and believes that Clay received the sum of \$30,000.00 from BRP for the Property.

58. The sum of \$30,000.00 was not the fair market value of the Property on May 3, 2007.

59. Krystal believes that the Property is now worth \$80,000.00 to \$100,000.00.

60. Clay's attorney, Mark Fuller, is the statutory registered agent for BRP, and Clay has a business relationship with officer(s) of BRP.

61. BRP had actual or constructive knowledge of the defects in Clay's title to the Property.

62. BRP had actual or constructive knowledge that Clay committed a breach of constructive trust.

63. Notwithstanding BRP's actual or constructive knowledge of the title defects and Clay's breach of trust, BRP participated in the sale and bought the Property for an amount substantially below fair market value.

64. BRP is not a *bona fide* purchaser in good faith, for value, of the Property.

65. The transfer to BRP should be set aside, and the Property, together with any income derived therefrom, should be returned to Clay, in trust for Krystal, and reconveyed to Krystal upon payment of amounts due on the loan.

#### **COUNT IV - FRAUD**

66. Krystal re-alleges paragraphs number 1-65 set forth above.

67. Clay was well-aware of Krystal's fragile emotional and financial state at the time the documents herein were executed.

68. Clay took advantage of Krystal's fragile emotional and financial state.

69. Clay knowingly and falsely represented to Krystal that he would make payments if she was unable to do so, and that he would allow her to repay him over time.

70. Clay knowingly and fraudulently transferred the Property to BRP, without notice to Krystal.

71. Clay knowingly and fraudulently attempted to abrogate Krystal's right of redemption in the Property.

72. Clay violated his confidential relationship with Krystal.

73. Based upon the actions of Clay, Krystal has been damaged in an amount to be proven at trial.

#### **COUNT V – COVENANT OF GOOD FAITH AND FAIR DEALING**

74. Krystal re-alleges paragraphs number 1-73 set forth above.

75. Krystal relied upon the counsel and advice of the Bank and in particular, its officer, Nolan Lee.

76. On or about December 13, 2005, the Bank accepted a Deed of Trust from Krystal and Clay as co-grantors, notwithstanding the fact that Clay had no interest in the subject Property.

77. Nolan Lee falsely represented to Krystal that the documents he presented her to sign were a normal loan package.

78. Nolan Lee failed to send proper notices to Krystal of late payment(s), while sending notices of the same to Clay.

79. The Bank failed to honor Krystal's right of redemption in the Property, and re-conveyed the Property, together with title to the mobile home, to Clay.

80. Krystal relied upon Clay's verbal representations to her that he did not intend to take her Property, and that he would allow her to repay him if he helped her with any payments due on the loan.

81. Clay took advantage of Krystal's fragile emotional and financial position.
82. Clay failed to notify Krystal of communications he received from the Bank.
83. Clay voluntarily made payments to the Bank, in an effort to take advantage of Krystal.
84. Clay sold the Property to BRP without allowing Krystal to exercise her rights of redemption in the Property.
85. Krystal has been damaged by the actions of Clay and the Bank in an amount to be proven at trial.

#### **COUNT VI – AMBIGUOUS CONTRACT**

86. Krystal re-alleges paragraphs 1-85, set forth above.
87. The Loan Guarantee Agreement ("Agreement") states that "in the event Clay is required to make any payments whatsoever to the Bank of Commerce – Northgate that Clay may immediately record a Quit Claim Deed to the property. . . ."
88. The word "required" as utilized in the Agreement is not defined, and is reasonably subject to conflicting interpretation.
89. The Agreement does not define the word "required."
90. The Agreement was prepared by Clay.
91. The Agreement should be construed in favor of Krystal and against Clay.

#### **COUNT VII – ATTORNEY FEES AND COSTS**

92. Krystal re-alleges paragraphs 1-91 set forth above.
93. Krystal has been required to obtain counsel to prosecute this action.
94. Krystal should be awarded her reasonable attorney fees and costs pursuant to Idaho Code §12-120 and § 12-121.

WHEREFORE, Krystal prays for relief as follows:

1. That the Quitclaim Deed to the Property be adjudged a mortgage.
2. That an account be taken of the amount due Clay, after deducting any rents or profits received, and that upon payment by Krystal of the amount found due, Clay be required to reconvey the Property to Krystal.
3. That a constructive trust be found to exist in favor of Krystal.
4. That the sale transaction between Clay and BRP be voided and set aside.
5. For damages, in an amount to be proven at trial, against Clay for breach of the covenant of good faith and fair dealing.
6. For damages, in an amount to be proven at trial, against the Bank for breach of the covenant of good faith and fair dealing.
7. For a finding that the Agreement between the parties is ambiguous, and should therefore be construed against Clay.
8. For her attorney fees and costs of suit incurred herein.
9. For such other and further relief as to the Court seems just and equitable in the premises.

DATED: May 29, 2007.

  
E.W. Pike  
E.W. Pike & Associates, P.A.  
Attorneys for Plaintiffs

# EXHIBIT A



FILE No. \_\_\_\_\_

INSTRUMENT No. 462885

## WARRANTY DEED

FOR VALUABLE CONSIDERATION RECEIVED \_\_\_\_\_

TOM AND RAEONA NUGENT, HUSBAND AND WIFE, the Grantor,  
does hereby grant, bargain, sell and convey unto \_\_\_\_\_

TODD D. AND KRYSTAL M. BARRETT, HUSBAND AND WIFE, the Grantee.

whose current address is UCON, IDAHO 83454

the following described real estate situated in FREMONT County,

State of Idaho, to-wit:

BUFFALO RIVER ESTATES DIVISION NO. 2  
LOT 15 BLK 6;  
SEC 23 TWP 13 RGE 43; FREMONT COUNTY, IDAHO

(SEE ATTACHED EXHIBIT "A")

TO HAVE AND TO HOLD the said premises, together with all tenements, hereditaments and appurtenances thereunto belonging, unto the said Grantee, his successors and assigns forever. Grantor does hereby covenant to and with the said Grantee that IT is the owner in fee simple of said premises and that IT will warrant and defend the same from all lawful claims whatsoever.

In construing this Deed and where the context so requires, the singular includes the plural and the masculine, the feminine and neuter.

DATED 5-12-00

Tom Nugent  
Raeona Nugent

STATE OF IDAHO, County of \_\_\_\_\_

On this 12 day of May 192000  
before me, Janice Sharp, a  
Notary Public in and for the said State personally  
appeared

Tom and Raeona Nugent

Known to me to be the person(s) whose name(s)  
subscribed to the within instrument, and acknowl-  
edges to me that \_\_\_\_\_ executed the same.

Janice Sharp

Remains of St Anthony  
Comm. Expires: 9/7/2005

THIS SPACE FOR COUNTY RECORD'S USE ONLY.

Microfilm No. 462885  
Date 12 Day May 2000  
At 14:50 O'clock P M  
MICHELLE FUNK

FREMONT CO. RECORDER CM Deputy

Recorded at Request of  
Raeona Nugent  
Return to Barrett  
PO Box 392  
Ucon ID 83454



462885

EXHIBIT "A"

PARCEL 1: Lot 15, Block 6, Buffalo River Estates Division No. 2,  
Fremont County, Idaho, as per the recorded plat thereof.

PARCEL 2:

A parcel of land in the NE¼ of Section 23, Township 13 North,  
Range 43, East of the Boise Meridian, lying South of and adjacent  
to the South lines of Buffalo River Estates, Division #2, Fremont County,  
Idaho, described as follows:

Beginning at the Southeast corner of Lot 15, Block 6 of Buffalo River  
Estates, Division #2;

Thence South  $89^{\circ} 44' 48''$  West, 100.58 feet to the Southwest corner of  
said Lot 15;

Thence South  $0^{\circ} 15' 12''$  East, 118.39 feet to a point of curve with a  
radius of 30.00 feet;

Thence to the left along said curve 47.24 feet through a central angle  
of  $90^{\circ} 13' 42''$ ;

Thence North  $89^{\circ} 44' 48''$  East, 71.05 feet;

Thence North  $0^{\circ} 15' 12''$  West, 148.51 feet TO THE POINT OF  
BEGINNING.

# **EXHIBIT B**

ATTORNEY LAW OFFICE - CLAY EXCAVATION @000

## LOAN GUARANTEE AGREEMENT

THIS AGREEMENT made this 13 day of December, 2005, between Krystal M. Barrett, 895 East 11<sup>th</sup> Street, Idaho Falls, Idaho 83404, hereafter "Barrett", and Kelly N. Clay, 4470 N. 25<sup>th</sup> East, Idaho Falls, Idaho 83401, hereafter "Clay", pursuant to the terms set forth hereafter.

### RECITALS

WHEREAS, Barrett desires to obtain a loan in the amount of \$20,477.00 from the Bank of Commerce - Northgate, 1020 Northgate Mile, Idaho Falls, Idaho 83401, for the purpose of debt consolidation; and

WHEREAS, the Bank of Commerce - Northgate requires that Barrett obtain a co-signature on such loan, which shall be secured by a Deed of Trust recorded against real property owned by Barrett in Fremont County, Idaho, as more particularly described on Exhibit "A", attached hereto and incorporated by reference, together with improvements located on such property including a 1958 SCHU HS TL Mobile Home VIN V-58860; and

WHEREAS, Clay is willing to co-sign such loan, pursuant to the terms set forth hereafter, now, therefore,

IT IS HEREBY AGREED as follows:

1. Clay will co-sign the above-entitled loan in the total amount of \$20,477.00 with the Bank of Commerce - Northgate and stand as guarantor for such loan in the event Barrett fails to make timely payment.

2. Barrett agrees to make timely and proper payment on a monthly basis beginning January 25, 2006, in the amount of \$270.25 per month, and agrees to use all reasonable efforts to obtain the release of Clay as guarantor on such loan on or before January 1, 2007. Barrett agrees

to keep Clay informed throughout 2006 as to all efforts being made by Barrett to obtain the release of Clay as a guarantor on such loan.

3. Barrett shall issue a Deed of Trust to the benefit of Clay against the real property described on Exhibit "A" with Clay's security subservient only to the Bank of Commerce - Northgate in such amount as Clay shall be required to pay to the Bank of Commerce - Northgate, in the event payment is not timely made by Barrett.

4. Barrett agrees to make payment of \$350.00 to Clay's attorney, Mark R. Fuller of Fuller & Carr, within two (2) business days of receipt of the loan funds from the Bank of Commerce - Northgate. Barrett further agrees to pay any and all attorney fees which may be incurred by Clay to enforce this Agreement and the Deed of Trust issued to Clay.

5. Barrett further agrees that in the event Clay is required to make any payments whatsoever to the Bank of Commerce - Northgate that Clay may immediately record a Quit Claim Deed to the property described on Exhibit "A", transferring the property and improvements to Clay, subject to the Bank of Commerce - Northgate debt.

6. Barrett further warrants that no other claims of any type or nature, including Deeds of Trust, have been recorded against the property described on Exhibit "A".

IN WITNESS WHEREOF, the undersigned have executed this Agreement, on the date first above written.

Date: 12-13-05

Krystal M. Barrett  
Krystal M. Barrett

Date: 12-13-05

Kelly N. Clay  
Kelly N. Clay

508645

QUIT CLAIM DEED

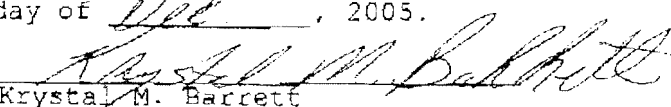
GRANTOR, Krystal M. Barrett, of 895 E. 11<sup>th</sup> Street, Idaho Falls, Id. 83404, County of Bonneville, State of Idaho, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, does hereby REMISE, RELEASE, and forever QUITCLAIM, unto Kelly N. Clay, whose mailing address is 4470 N. 25<sup>th</sup> East, Idaho Falls, County of Bonneville, State of Idaho 83401 as GRANTEE, and to grantee's heirs and assigns forever, all of the following described real estate situated in Fremont County, State of Idaho:

LEGAL DESCRIPTION:

SEE EXHIBIT "A"

TOGETHER with all improvements, water, water rights, ditches, ditch rights, easements, tenements, hereditaments and appurtenances thereto.

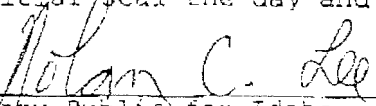
IN WITNESS WHEREOF, Grantor has hereunto subscribed her name to this instrument this 13 day of Dec, 2005.

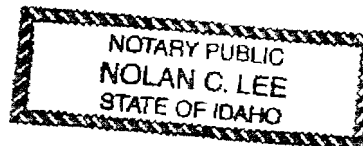
  
Krystal M. Barrett

STATE OF IDAHO )  
 ) ss.  
County of Bonneville )

On this 13 day of December, 2005, before me, a Notary Public for Idaho, personally appeared Krystal M. Barrett, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that executed the same.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal the day and year first above written.

  
Notary Public for Idaho  
Residing at: Idaho Falls  
My Commission Expires: 11-21-2007



508645

EXHIBIT "A"

PARCEL 1: Lot 15, Block 6, Buffalo River Estates Division No. 2,  
Fremont County, Idaho, as per the recorded plat thereof.

PARCEL 2:

A parcel of land in the NE¼ of Section 23, Township 13 North,  
Range 43, East of the Boise Meridian, lying South of and adjacent  
to the South lines of Buffalo River Estates, Division #2, Fremont County,  
Idaho, described as follows:

Beginning at the Southeast corner of Lot 15, Block 6 of Buffalo River  
Estates, Division #2;

Thence South 89° 44' 48" West, 100.58 feet to the Southwest corner of  
said Lot 15;

Thence South 0° 15' 12" East, 113.39 feet to a point of curve with a  
radius of 30.00 feet;

Thence to the left along said curve 47.24 feet through a central angle  
of 90° 13' 42";

Thence North 89° 44' 48" East, 71.05 feet;

Thence North 0° 15' 12" West, 148.51 feet TO THE POINT OF  
BEGINNING.

508645

Microfilm No. 4 Day March 07  
At 3:00 O'Clock A M  
ABBIE MACE  
FREMONT CO RECORDER  
Fee \$ 6 Deputy  
Recorded at Request of  
Fuller Carr

## ALL INCLUSIVE DEED OF TRUST

BY THIS DEED OF TRUST, made this \_\_\_\_ day of December, 2005, BETWEEN Krystal M. Barrett herein called GRANTOR, whose address is: 895 E. 11<sup>th</sup> Street, Idaho Falls, Idaho 83404, Carr Land & Title Company, an Idaho Corporation, dba IDAHO TITLE AND TRUST, herein called TRUSTEE, and Kelly N. Clay, 4470 N. 25<sup>th</sup> East, Idaho Falls, Idaho 83401 herein called BENEFICIARY, Grantor grants, transfers, and assigns to Trustee, in trust, with power of sale, that property in Fremont County, Idaho, described as follows, either located within an incorporated city or village at the date hereof, or containing not more than twenty acres:

See Exhibit "A"

Grantor requests that any notice of default and any notice of sale hereunder be mailed to Grantor at the address herein set forth.

For the purpose of securing:

(1) Performance of the loan guarantee agreement of Grantor of even date herewith incorporated by reference or contained herein; (2) Payment of the indebtedness evidenced by one promissory note of even date herewith any extensions or renewals thereon in the principal sum of \$20,477.00 payable to Bank of Commerce - Northgate, final payment due December 10, 2010; (3) the payment of any money that may be advanced by the Beneficiary to Grantor, with interest thereon, evidenced by additional notes (indicating they are so secured) or by endorsement on the original note, executed by Trustor.

### A. TO PROTECT THE SECURITY HEREOF, GRANTOR AGREES:

(1) To perform the obligations secured by such included deeds of trust other than the payments to be made by Beneficiary as set forth in the note secured by this deed of trust. As between the parties herein and their successors and assigns, no assumption or guarantee agreement executed by Grantor for the benefit of the holders of the included notes shall be deemed to affect this obligation of Beneficiary.

(2) To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay when due all claims for labor performed and materials furnished therefor; to comply with all laws affecting said property or requiring any alterations or improvements to be made thereon; not to commit or permit waste thereon; not to commit, suffer or permit any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.

(3) To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or Beneficiary may release all or part thereof to Grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

(4) To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorney's fees, in a reasonable sum, in any such action or proceedings in which Beneficiary or Trustee may appear.

(5) To pay, at least ten days before delinquency all taxes and assessments affecting said property, including assessments on appurtenant water stock; when due, all encumbrances, charges and liens, except those payments to be made by Beneficiary as provided in the note secured hereby, with interest, on said property or any part thereof, which appear in or prior or superior hereto, all costs, fees and expenses of this Trust.

Should Grantor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Grantor and without releasing Grantor from any obligation hereof, may make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof. Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceedings purporting to affect the security hereof or the rights or powers of the Beneficiary or Trustee; pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto, and, in exercising any such powers pay necessary expenses, employ counsel and pay his reasonable fees.

(6) To pay immediately and without demand all sums expended by Beneficiary or Trustee, with interest from date of expenditure at the highest lawful rate permissible under Idaho law, and to pay for any statement provided for by law regarding the obligations secured hereby in the amount demanded by Beneficiary, not exceeding the maximum amount permitted by law at the time of the request therefor.

### B. IT IS MUTUALLY AGREED THAT:

(1) Any award of damages in connection with any condemnation for public use of or injury to said property or any part thereof is hereby assigned and shall be paid to Beneficiary who may apply or release such moneys received in the same manner and with the same effect as above provided for disposition of proceeds of fire or other insurance.

(2) By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive the right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.

(3) At any time or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed and said note for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby, Trustee may: reconvey all or any part of said property; consent to the making of any map or plat thereof; join in granting any easement hereon; or join in and extension agreement or any agreement subordinating the lien or charge hereof.

(4) Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed and said note to Trustee for cancellation and retention and upon payment of its fees, Trustee shall reconvey, without warranty, the property then held hereunder. The recitals in any reconveyance executed under this Deed of Trust of any matter or facts shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons legally entitled thereto."

(5) Upon default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of his election to cause to be sold the herein described property to satisfy the obligations hereof, and shall cause such notice to be recorded in the office of the recorder of each county wherein said real estate property or some part thereof is situated.

Notice of sale having been given as then required by law, and not less than the time then required by law having elapsed, Trustee, without demand on Grantor, shall sell said property at the time and place fixed by it in said notice of sale, either as a whole or in separate parcels and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee shall deliver to the purchaser its deed conveying the property so sold but without any covenant or warranty express or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Grantor, Trustee, or Beneficiary, may purchase at such a sale. The bid by the holder of this note upon the credit of the money obligation secured hereby shall be reduced in an amount equivalent to the then unpaid principal balance of the included notes.

After deducting all costs, fees and expenses of Trustee and of the this Trust, including cost of evidence of title and reasonable counsel fees in connection with said, Trustee shall apply the proceeds of sale to payment of all sums expended under the terms hereof, not then repaid, with accrued interest at the highest lawful rate permissible under Idaho law; all other sums then secured hereby; and the remainder, if any, to the person or persons legally entitled thereto.

(6) This deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. The term Beneficiary shall mean the holder and owner of the note secured hereby; or, if the note has been pledged, the pledgee thereof.

(7) Trustee accepts this Trust when this Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Grantor, Beneficiary or Trustee shall be a party unless brought by Trustee or unless requested as provided by law.

(8) The Trusts created hereby are irrevocable by Grantor.



(9) In the event of dissolution or resignation of the Trustee, the Beneficiary may substitute a trustee or trustees to execute the trust hereby created, and when any such substitution has been filed for record in the office of the county recorder, it shall be conclusive evidence of the appointment of such trustee or trustees, and such new trustee or trustees shall succeed in all of the powers and duties of the trustee or trustees named herein.

(THIS DEED OF TRUST FOR USE ONLY IN PURCHASE MONEY TRANSACTIONS. IT IS RECOMMENDED THAT, PRIOR TO THE EXECUTION OF THIS DEED OF TRUST, THE PARTIES CONSULT WITH THEIR ATTORNEYS WITH RESPECT TO SAME.)

Krystal M. Barrett

STATE OF IDAHO, County of Bonneville

—THIS SPACE FOR RECORDER'S USE ONLY—

On this 13 day of December, 2005, before me, THE UNDERSIGNED, Notary Public in and for said State personally appeared Krystal M. Barrett

Known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Notary Public for Idaho

Residing At:

Comm. Expires:

NOTARY PUBLIC  
NOLAN C. LEE  
STATE OF IDAHO

DO NOT RECORD THE MATTERS BELOW THIS LINE

FOR RECONVEYANCE OR FORECLOSURE SEND TO THE NEAREST OFFICE OF  
IDAHO TITLE AND TRUST

**REQUEST FOR FULL RECONVEYANCE**

To be used only when note has been paid

Dated:

**TO IDAHO TITLE AND TRUST, TRUSTEE:**

The undersigned is the legal owner and holder of all indebtedness secured by the within Deed of Trust. All sums secured by said Deed of Trust have been fully paid and satisfied; and you are hereby requested and directed on payment to you of any sums owing to you under the terms of said Deed of Trust, to cancel all evidence of indebtedness, secured by said Deed of Trust, delivered to you herewith together with the said Deed of Trust, and to reconvey, without warranty, to the parties designated by the terms of said Deed of Trust, the estate now held by you under the same.

**MAIL RECONVEYANCE TO:**

(By) \_\_\_\_\_

(By) \_\_\_\_\_

Do not lose or destroy this Deed of Trust OR THE NOTE which it secures. Both must be delivered to the Trustee for cancellation before reconveyance will be made.

**ALL-INCLUSIVE  
DEED OF TRUST  
WITH POWER OF SALE**

IDAHO TITLE AND TRUST

P.O. Box 50367  
Idaho Falls, Idaho 83404

EXHIBIT "A"

PARCEL 1: Lot 15, Block 6, Buffalo River Estates Division No. 2, Fremont County, Idaho, as per the recorded plat thereof.

PARCEL 2:

A parcel of land in the NE¼ of Section 23, Township 13 North, Range 43, East of the Boise Meridian, lying South of and adjacent to the South lines of Buffalo River Estates, Division #2, Fremont County, Idaho, described as follows:

Beginning at the Southeast corner of Lot 15, Block 6 of Buffalo River Estates, Division #2;

Thence South  $89^{\circ}44'48''$  West, 100.53 feet to the Southwest corner of said Lot 15;

Thence South  $0^{\circ}15'12''$  East, 118.39 feet to a point of curve with a radius of 30.00 feet:

Thence to the left along said curve 47.24 feet through a central angle of  $90^{\circ}13'42''$ ;

Thence North  $89^{\circ}44'48''$  East, 71.05 feet;

Thence North  $0^{\circ}15'12''$  West, 148.51 feet TO THE POINT OF BEGINNING.

*KMB*

# EXHIBIT C



SECURITY INTEREST. I give you a security interest in all of the Property described below that I own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located, and all proceeds and products of the Property. "Property" includes all parts, accessories, repairs, replacements, improvements, and accessions to the Property; any original evidence or title or ownership; and all obligations that I owe that the payment or performance of the Property "Proceeds" includes anything acquired upon the sale, lease, license, exchange, or other disposition of the Property; any rights and claims arising from the Property; and any collections and distributions on account of the Property.

☒ **Accounts and Other Rights to Payment:** All rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) which I have by law or agreement against any account debtor or obligor.

☐ **Inventory:** All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in my business.

☐ **Equipment:** All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts, and tools. The Property includes any equipment described in a list or schedule I give to you, but such a list is not necessary to create a valid security interest in all of my equipment.

☐ **Instruments and Chattel Paper:** All instruments, including negotiable instruments and promissory notes and any other writings or records that evidence the right to payment of a monetary obligation, and tangible and electronic chattel paper.

☐ **General Intangibles:** All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyrights, trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use my name.

☐ **Documents:** All documents of title including, but not limited to, bills of lading, dock warrants and receipts, and warehouse receipts.

☐ **Farm Products and Supplies:** All farm products including, but not limited to, all poultry and livestock and their young, along with their produce, products, and replacements; all crops, annual or perennial, and all products of the crops; and all feed, seed, fertilizer, medicines, and other supplies used or produced in my farming operations.

☐ **Government Payments and Programs:** All payments, accounts, general intangibles, and benefits including, but not limited to, payments in kind, deficiency payments, letters of entitlement, warehouse receipts, storage payments, emergency assistance and diversion payments, production flexibility contracts, and conservation reserve payments under any preexisting, current, or future federal or state government program.

☐ **Investment Property:** All investment property including, but not limited to, certificated securities, uncertificated securities, securities entitlements, securities accounts, commodity contracts, commodity accounts, and financial assets.

☒ **Deposit Accounts:** All deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts.

☒ **Specific Property Description:** The Property includes, but is not limited by, the following:

1958 SCHULS TL MOBILE HOME VIN - V 56660

If applicable, enter real estate description and record owner information: DEED OF TRUST DATED 12/07/2005

The Property will be used for a ☒ personal ☐ business ☐ agricultural ☐ \_\_\_\_\_ purpose.

Borrower/Owner State of organization/registration (if applicable) \_\_\_\_\_

#### ADDITIONAL TERMS OF THE SECURITY AGREEMENT

**GENERALLY** - This agreement secures this note and any other debt I have with you, now or later. However, it will not secure other debts if you fail with respect to such other debts, to make any required disclosure about this security agreement or if you fail to give any required notice of the right of rescission. If property described in this agreement is located in another state, this agreement may also, in some circumstances, be governed by the law of the state in which the Property is located.

**NAME AND LOCATION** - My name indicated on page 1 is my exact legal name. If I am an individual, my address is my principal residence. If I am not an individual, my address is the location of my chief executive offices or sole place of business. If I am an entity organized and registered under state law, my address is located in the state in which I am registered, unless otherwise indicated on page 2. I will provide verification of registration and location upon your request. I will provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration.

**OWNERSHIP AND DUTIES TOWARD PROPERTY** - I represent that I own all of the Property, or to the extent this is a purchase money security interest I will acquire ownership of the Property with the proceeds of the loan. I will defend it against any other claim. Your claim to the Property is ahead of the claims of any other creditor. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position. I will not use the Property for a purpose that will violate any laws or subject the Property to forfeiture or seizure.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these records at any reasonable time. I will prepare any report or accounting you request, which deals with the Property.

I will keep the Property in my possession and will keep it in good repair and use it only for the purpose(s) described on page 1 of this agreement. I will not change this specified use without your express written permission. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

I will keep the Property at my address listed on page 1 of this agreement, unless we agree I may keep it at another location. If the Property is to be used in another state, I will give you a list of those states. I will not try to sell the Property unless it is inventory or I receive your written permission to do so. If I sell the Property I will have the payment made payable to the order of you and me.

You may demand immediate payment of the debt(s) if the debtor is not a natural person and without your prior written consent: (1) a beneficial interest in the debtor is sold or transferred, or (2) there is a change in either the identity or number of members of a partnership, or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation.

I will pay all taxes and charges on the Property as they become due. You have the right of reasonable access in order to inspect the Property. I will immediately inform you of any loss or damage to the Property.

If I fail to perform any of my duties under this security agreement, or trust, lien or other security interest, you may form the duties or cause them to be performed. I shall not create an obligation to perform and I will not preclude you from exercising any of your rights under this security agreement.

**PURCHASE MONEY SECURITY INTEREST** - For the sole purpose of determining the extent of a purchase money security interest arising under this security agreement: (a) payments on any nonpurchase money loan also secured by this agreement will not be deemed to apply to the Purchase Money Loan, and (b) payments on the Purchase Money Loan will be deemed to apply first to the nonpurchase money portion of the loan, if any, and then to the purchase money obligations in the order in which the items of collateral were acquired or if acquired at the same time, in the order selected by you. No security interest will be terminated by application of this formula. "Purchase Money Loan" means any loan the proceeds of which, in whole or in part, are used to acquire any collateral securing the loan and all extensions, renewals, consolidations and refinancing of such loan.

**PAYMENTS BY LENDER** - You are authorized to pay, on my behalf, charges I am or may become obligated to pay to preserve or protect the secured property (such as property insurance premiums). You may treat those payments as advances and add them to the unpaid principal under the note secured by this agreement or you may demand immediate payment of the amount advanced.

**INSURANCE** - I agree to buy insurance on the Property against the risks and for the amounts you require and to furnish you continuing proof of coverage. I will have the insurance company name you as loss payee on any such policy. You may require added security if you agree that insurance proceeds may be used to repair or replace the Property. I will buy insurance from a firm licensed to do business in the state of Idaho. The firm will be reasonably acceptable to you. The insurance will last until the Property is released from this agreement. If I fail to buy or maintain the insurance (or fail to name you as loss payee) you may purchase it yourself.

**WARRANTIES AND REPRESENTATIONS** - If this agreement includes accounts, I will not settle any account for less than its full value without your written permission. I will collect all accounts until you tell me otherwise. I will keep the proceeds from all the accounts and any goods which are returned to me or which I take back in trust for you. I will not mix them with any other property of mine. I will deliver them to you at your request. If you ask me to pay you the full price on any returned items or items retained by myself, I will do so. You may exercise my rights with respect to obligations of any account debtors, or other persons obligated on the Property, to pay or perform, and you may enforce any security interest that secures such obligations.

If this agreement covers inventory, I will not dispose of it except in my ordinary course of business at the fair market value for the Property, or at a minimum price established between you and me.

Any person who signs within this box does so to give you a security interest in the Property described on this page. This person does not promise to pay the note. This as used in this security agreement will include the borrower and any person who signs within this box.

Date \_\_\_\_\_

Signed \_\_\_\_\_

This agreement covers farm products I own. I hereby warrant, at your request, a written list of the buyers, commission merchants or selling agents to or through whom I may sell my farm products. In addition to those parties named on this written list, I authorize you to notify at your sole discretion any other parties regarding your security interest in my farm products. I remain subject to all applicable penalties for selling my farm products in violation of my agreement with you and the Food Security Act. In this paragraph the terms farm products, buyers, commission merchants and selling agents have the meanings given to them in the Federal Food Security Act of 1985.

If this agreement covers chattel paper or instruments, either as original collateral or proceeds of the Property, I will note your interest on the face of the chattel paper or instruments.

**REMEDIES** - I will be in default on this security agreement if I am in default on any note this agreement secures or if I fail to keep any promise contained in the terms of this agreement. If I default, you have all of the rights and remedies provided in the note and under the Uniform Commercial Code. You may require me to make the secured property available to you at a place which is reasonably convenient. You may take possession of the secured property and sell it as provided by law. The proceeds will be applied first to your expenses and then to the debt. I agree that 10 days written notice sent to my last known address by first class mail will be reasonable notice under the Uniform Commercial Code. My current address is on page 1.

**PERFECTION OF SECURITY INTEREST** - I authorize you to file a financing statement covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining possession of or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code.

#### ADDITIONAL TERMS OF THE NOTE

**DEFINITIONS** - As used on pages 1 and 2, "X" means the terms that apply to this loan. "I," "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, endorsers, and sureties) who agrees to pay this note (together referred to as "us"). "You" or "your" means the lender and its successors and assigns.

**APPLICABLE LAW** - The law of the state of loan will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

**PAYMENTS** - Each payment I make on this note will first reduce the amount I owe you for charges which pre-number interest and principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless when I make the prepayment, you and I agree in writing to the contrary).

**INTEREST** - Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal sum outstanding at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to in this note (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

**INDEX RATE** - The index will serve only as a device for setting the interest rate on this note. You do not guarantee by selecting this index, or the margin that the interest rate on this note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers.

**POST MATURITY RATE** - For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

**SINGLE ADVANCE LOANS** - If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph on page 2.

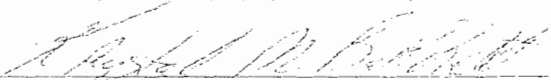
**MULTIPLE ADVANCE LOANS** - If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

**SET-OFF** - I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

- (1) any deposit account balance I have with you;
- (2) any money owed to me on an item presented to you or in your possession for collection or exchange; and
- (3) any repurchase agreement or other nondeposit obligation.

**SIGNATURES. I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGES 1 AND 2). I have received a copy on today's date.**

  
\_\_\_\_\_  
KRISTAL M. BARRETT

"Any amount due" means the amount payable under this note means the total amount of which you are obligated to demand payment under the terms of this note, including any set off. This total includes any balance the due date for this note.

If my loan is secured by money from you is also owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right to set-off.

**DEFAULT** - I will be in default if any one or more of the following occur: (1) I fail to make a payment on time or in the amount due; (2) I fail to keep the Property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a local authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1840, Subpart G, Exhibit M.

**REMEDIES** - If I am in default on this note you have, but are not limited to, the following remedies:

- (1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued unpaid charges).
- (2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein.
- (3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy.
- (4) You may refuse to make advances to me or allow purchases on credit by me.
- (5) You may use any remedy you have under state or federal law.
- (6) You may make use of any remedy given to you in any agreement securing this note.

By selecting any one or more of these remedies you do not give up your right to use later any other remedy. By waiving your right to declare an event to be a default, you do not waive your right to consider later the event a default if it continues or happens again.

**COLLECTION COSTS AND ATTORNEY'S FEES** - I agree to pay all costs of collection, repayment or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

**WAIVER** - I give up my rights to require you to do certain things. I will not require you to:

- (1) demand payment of amounts due (presentment);
- (2) obtain official certification of nonpayment (protest); or
- (3) give notice that amounts due have not been paid (notice of dishonor).


I waive any defenses I have based on suretyship or impairment of collateral.

**OBLIGATIONS INDEPENDENT** - I understand that I must pay this note even if someone else has also agreed to pay it (by, for example, signing this form or a separate guarantee or endorsement). You may sue me alone, or anyone else who is obligated on this note, or any number of us together, to collect this note. You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me from my duty to pay it. Of course, you are entitled to only one payment in full. I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice and for any term without affecting my liability for payment of the note. I will not assign my obligation under this agreement without your prior written approval.

**FINANCIAL INFORMATION** - I agree to provide you, upon request, any financial statement or information you may deem necessary. I warrant that the financial statements and information I provide to you are or will be accurate, correct and complete.

**PAYMENT BY CHECK** - If any payment on this note is made with a check that is dishonored, I agree to pay you a \$20.00 fee.

SIGNATURE FOR LENDER:

  
\_\_\_\_\_  
NORMAN C. LEE, VICE PRESIDENT

ACKNOWLEDGMENT STATE OF OHIO

County ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, 2001, before me, \_\_\_\_\_, a Notary Public in and for the State of Ohio, personally appeared \_\_\_\_\_, known to me to be the person(s) whose name is subscribed to the foregoing instrument, and

he acknowledged to me that he executed the same.

He set his hand and seal to the foregoing instrument on the day and year first above written.

Notary Public residing at:

could be notarized when a record interest is taken in a motor vehicle.

Keep Systems, Inc., 34 South 4th Street, Columbus, OH 43215-2901

Notary Public

3046524467 D+E  
ALLIANCE TITLE & ESCROW  
P.O. BOX 732  
REXBURG, ID 83440

Microfilm No. 499843  
13 Day Dec 20 05  
At 15:40 O'Clock P M  
ABBIE MACE  
FREMONT CO RECORDER  
Fee \$ 25 Deputy  
Recorded at Request of  
ALLIANCE TITLE & ESCROW

State of Idaho

Space Above This Line For Recording Data

**DEED OF TRUST**  
(With Future Advance Clause)

1. **DATE AND PARTIES.** The date of this Deed of Trust (Security Instrument) is 12-07-2005 and the parties, their addresses and tax identification numbers, if required, are as follows:

GRANTOR: KRYSTAL M. BARRETT, AS SOLE AND SEPARATE PROPERTY  
KELLY N. CLAY  
895 EAST 11TH STREET  
IDAHO FALLS, ID 83404

☐ If checked, refer to the attached Addendum incorporated herein, for additional Grantors, their signatures and acknowledgments.

TRUSTEE: ALLIANCE TITLE & ESCROW  
451 PARK AVE.  
IDAHO FALLS, ID 83402

LENDER: THE BANK OF COMMERCE-NORTHGATE  
1020 NORTHGATE MILE  
IDAHO FALLS, ID 83401

2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined below) and Grantor's performance under this Security Instrument, Grantor irrevocably grants, bargains, sells and conveys to Trustee, in trust for the benefit of Lender, with power of sale, the following described property: SEE EXHIBIT 'A' WHICH IS ATTACHED HERETO AND MADE A PART HEREOF.

The property is located in FREMONT at 4058 STEELHEAD DRIVE  
(County)  
ISLAND PARK, Idaho 83421  
(Address) (City) (ZIP Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, ditches, and water stock and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Security Instrument at any one time shall not exceed \$ 20,477.00. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.
4. **SECURED DEBT AND FUTURE ADVANCES.** The term "Secured Debt" is defined as follows:  
A. Debt incurred under the terms of all promissory note(s), contract(s), guaranty(s) or other evidence of debt described below and all their extensions, renewals, modifications or substitutions. (When referencing the debts below it is suggested that you include items such as borrowers' names, note amounts, interest rates, maturity dates, etc.)  
NOTE DATED 12/07/2005 IN THE AMOUNT OF \$20,477.00, TO MATURE ON 12/25/2010

- B. All future advances from Lender to Grantor or other future obligations of Grantor to Lender under any promissory note, contract, guaranty, or other evidence of debt executed by Grantor in favor of Lender after this Security Instrument whether or not this Security Instrument is specifically referenced. If more than one person signs this Security Instrument, each Grantor agrees that this Security Instrument will secure all future advances and future obligations that are given to or incurred by any one or more Grantor, or any one or more Grantor and others. All future advances and other future obligations are secured by this Security Instrument even though all or part may not yet be advanced. All future advances and other future obligations are secured as if made on the date of this Security Instrument. Nothing in this Security Instrument shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment must be agreed to in a separate writing.
- C. All obligations Grantor owes to Lender, which may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.
- D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Security Instrument.
- This Security Instrument will not secure any other debt if Lender fails to give any required notice of the right of rescission.
5. **PAYMENTS.** Grantor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument. If any note evidencing the Secured Debt contains a variable rate feature, Grantor acknowledges that the interest rate, payment terms, or balance due on the loan may be indexed, adjusted, renewed or renegotiated.
  6. **WARRANTY OF TITLE.** Grantor warrants that Grantor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to irrevocably grant, bargain, sell and convey the Property to Trustee, in trust, with power of sale. Grantor also warrants that the Property is unencumbered, except for encumbrances of record.
  7. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Grantor agrees:
    - A. To make all payments when due and to perform or comply with all covenants.
    - B. To promptly deliver to Lender any notices that Grantor receives from the holder.
    - C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.
  8. **CLAIMS AGAINST TITLE.** Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Grantor may have against parties who supply labor or materials to maintain or improve the Property.
  9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Security Instrument is released.
  10. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor shall not commit or allow any waste, impairment, or deterioration of the Property. Grantor will keep the Property free of noxious weeds and grasses. Grantor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Grantor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor, and of any loss or damage to the Property. Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender shall give Grantor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property shall be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.
  11. **AUTHORITY TO PERFORM.** If Grantor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. Lender's right to perform for Grantor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.
  12. **ASSIGNMENT OF LEASES AND RENTS.** Grantor absolutely, unconditionally, irrevocably and immediately assigns, grants, bargains and conveys to Trustee, in trust for the benefit of Lender all the right, title and interest in the following (all referred to as Property): existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including any extensions, renewals, modifications or replacements (all referred to as Leases); and rents, issues and profits (all referred to as Rents). In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement. Grantor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Lender grants Grantor a revocable license to collect, receive, enjoy and use the Rents as long as Grantor is not in default. Grantor's default automatically and immediately revokes this license. Upon default, Grantor will receive any Rents in trust for Lender and Grantor will not commingle the Rents with any other funds. When Lender so directs, Grantor will endorse and deliver any payments of Rents from the Property to Lender. Grantor agrees that Lender will not be considered to be a mortgagee-in-possession by executing this Security Instrument or by collecting or receiving payments on the Secured Debts, but only may become a mortgagee in-possession after Grantor's license to collect, receive, enjoy and use the Rents is revoked by Lender or automatically revoked on Grantor's default, and Lender takes actual possession of the Property. Consequently, until Lender takes actual possession of the Property, Lender is not obligated to perform or discharge any obligation of Grantor under the Leases, appear in or defend any action or proceeding relating to the Rents, the Leases or the Property, or be liable in any way for any injury or damage to any person or property sustained in or about the Property. Grantor agrees that this Security Instrument is immediately effective between Grantor and Lender and effective as to third parties on the recording of this Assignment. As long as this Assignment is in effect, Grantor warrants and represents that no default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants.
  13. **LEASEHOLDS; CONDOMINIUMS; PLANNED UNIT DEVELOPMENTS.** Grantor agrees to comply with the provisions of any lease if this Security Instrument is on a leasehold. If the Property includes a unit in a condominium or a planned unit development, Grantor will perform all of Grantor's duties under the covenants, by laws, or regulations of the condominium or planned unit development.
  14. **DEFAULT.** Grantor will be in default if any party obligated on the Secured Debt fails to make payment when due or is in default if the prospect of payment, performance, or realization of collateral is significantly impaired.



15. **REMEDIES ON DEFAULT.** In some instances, federal and state law will require Lender to provide Grantor with notice of the right to cure or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Grantor is in default.
- At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the terms of the Secured Debt, this Security Instrument and any related documents, including without limitation, the power to sell the Property.
- If there is a default, Trustee shall, in addition to any other permitted remedy, at the request of the Lender, advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder for cash and convey absolute title free and clear of all right, title and interest of Grantor at such time and place as Trustee designates. Trustee shall give notice of sale including the time, terms and place of sale and a description of the property to be sold as required by the applicable law in effect at the time of the proposed sale.
- Upon sale of the property and to the extent not prohibited by law, Trustee shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser, and after first paying all fees, charges and costs, shall pay to Lender all moneys advanced for repairs, taxes, insurance, liens, assessments and prior encumbrances and interest thereon, and the principal and interest on the Secured Debt, paying the surplus, if any, to Grantor. Lender may purchase the Property. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein.
- All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require complete cure of any existing default. By not exercising any remedy on Grantor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.
16. **EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Grantor agrees to pay all of Lender's expenses if Grantor breaches any covenant in this Security Instrument. Grantor will also pay on demand any amount incurred by Lender for insuring, inspecting, preserving or otherwise protecting the Property and Lender's security interest. These expenses will bear interest from the date of the payment until paid in full at the highest interest rate in effect as provided in the terms of the Secured Debt. Grantor agrees to pay all costs and expenses incurred by Lender in collecting, enforcing or protecting Lender's rights and remedies under this Security Instrument. This amount may include, but is not limited to, attorneys' fees, court costs, and other legal expenses. This amount does not include attorneys' fees for a salaried employee of the Lender. This Security Instrument shall remain in effect until released. Grantor agrees to pay for any recordation costs of such release.
17. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), and all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law.
- Grantor represents, warrants and agrees that:
- Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance is or will be located, stored or released on or in the Property. This restriction does not apply to small quantities of Hazardous Substances that are generally recognized to be appropriate for the normal use and maintenance of the Property.
  - Except as previously disclosed and acknowledged in writing to Lender, Grantor and every tenant have been, are, and shall remain in full compliance with any applicable Environmental Law.
  - Grantor shall immediately notify Lender if a release or threatened release of a Hazardous Substance occurs on, under or about the Property or there is a violation of any Environmental Law concerning the Property. In such an event, Grantor shall take all necessary remedial action in accordance with any Environmental Law.
  - Grantor shall immediately notify Lender in writing as soon as Grantor has reason to believe there is any pending or threatened investigation, claim, or proceeding relating to the release or threatened release of any Hazardous Substance or the violation of any Environmental Law.
18. **CONDEMNATION.** Grantor will give Lender prompt notice of any pending or threatened action, by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.
19. **INSURANCE.** Grantor shall keep Property insured against loss by fire, flood, theft and other hazards and risks reasonably associated with the Property due to its type and location. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding sentence can change during the term of the loan. The insurance carrier providing the insurance shall be chosen by Grantor subject to Lender's approval, which shall not be unreasonably withheld. If Grantor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Security Instrument.
- All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "loss payee clause." Grantor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Grantor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Grantor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Grantor.
- Unless otherwise agreed in writing, all insurance proceeds shall be applied to the restoration or repair of the Property or to the Secured Debt, whether or not then due, at Lender's option. Any application of proceeds to principal shall not extend or postpone the due date of the scheduled payment nor change the amount of any payment. Any excess will be paid to the Grantor. If the Property is acquired by Lender, Grantor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.
20. **ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.
21. **FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Grantor will provide to Lender upon request, any financial statement or information Lender may deem reasonably necessary. Grantor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Security Instrument and Lender's lien status on the Property.
22. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Security Instrument are joint and individual. If Grantor signs this Security Instrument but does not sign an evidence of sale so only to mortgage Grantor's interest in the Property to secure payment of the Secured Debt and

- Grantor does not agree to be personally liable on the Secured Debt. If this Security Instrument secures a guaranty between Lender and Grantor, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. Grantor agrees that Lender and any party to this Security Instrument may extend, modify or make any change in the terms of this Security Instrument or any evidence of debt without Grantor's consent. Such a change will not release Grantor from the terms of this Security Instrument. The duties and benefits of this Security Instrument shall bind and benefit the successors and assigns of Grantor and Lender.
23. **APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Security Instrument is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Security Instrument is complete and fully integrated. This Security Instrument may not be amended or modified by oral agreement. Any section in this Security Instrument, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section of this Security Instrument cannot be enforced according to its terms, that section will be severed and will not affect the enforceability of the remainder of this Security Instrument. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Security Instrument are for convenience only and are not to be used to interpret or define the terms of this Security Instrument. Time is of the essence in this Security Instrument.
24. **SUCCESSOR TRUSTEE.** Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee without any other formality than the designation in writing. The successor trustee, without conveyance of the Property, shall succeed to all the title, power and duties conferred upon Trustee by this Security Instrument and applicable law.
25. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing. Notice to one grantor will be deemed to be notice to all grantors.
26. **WAIVERS.** Except to the extent prohibited by law, Grantor waives all rights to homestead exemption, appraisement and the marshalling of liens and assets relating to the Property.
27. **DECLARATION.** Grantor declares that the Property is either not more than forty acres in area or that the Property is located within an incorporated city or village.
28. **OTHER TERMS.** If checked, the following are applicable to this Security Instrument:
- ☐ **Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Security Instrument will remain in effect until released.
  - ☐ **Construction Loan.** This Security Instrument secures an obligation incurred for the construction of an improvement on the Property.
  - ☐ **Fixture Filing.** Grantor grants to Lender a security interest in all goods that Grantor owns now or in the future and that are or will become fixtures related to the Property. This Security Instrument suffices as a financing statement and any carbon, photographic or other reproduction may be filed of record for purposes of Article 9 of the Uniform Commercial Code.
  - ☐ **Riders.** The covenants and agreements of each of the riders checked below are incorporated into and supplement and amend the terms of this Security Instrument. [Check all applicable boxes]
    - ☐ Condominium Rider    ☐ Planned Unit Development Rider    ☐ Other .....
  - ☐ **Additional Terms.**

**SIGNATURES:** By signing below, Grantor agrees to the terms and covenants contained in this Security Instrument and in any attachments. Grantor also acknowledges receipt of a copy of this Security Instrument on the date stated on page 1.

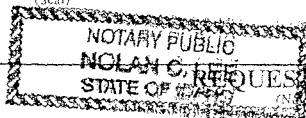
*Krystal M. Barrett* 12-13-05 *Kelly N. Clay* 12-13-05  
 (Signature) KRYSTAL M. BARRETT (Date) (Signature) KELLY N. CLAY (Date)

**ACKNOWLEDGMENT:**

STATE OF IDAHO, COUNTY OF } ss.  
 On this 7TH day of DECEMBER, 2005, before me, a Notary Public, personally appeared KRYSTAL M. BARRETT, AS SOLE AND SEPARATE PROPERTY, AND KELLY N. CLAY, known or identified to me (or proved to me on the oath of ), to be the person(s) whose name is subscribed to the within instrument, and acknowledged to me that she/he/they executed the same.

My commission expires: 11-21-2007

(Seal)



*Nolan C. Reese*  
 Residing at: Foxlo Falls  
 (Notary Public)

**TO TRUSTEE:**

The undersigned is the holder of the note or notes secured by this Deed of Trust. Said note or notes, together with all other indebtedness secured by this Deed of Trust, have been paid in full. You are hereby directed to cancel this Deed of Trust, which is delivered hereby, and to reconvey, without warranty, all the estate now held by you under this Deed of Trust to the person or persons legally entitled thereto.

Date

## EXHIBIT "A"

PARCEL 1: Lot 15, Block 6, Buffalo River Estates Division No. 2, -  
Fremont County, Idaho, as per the recorded plat thereof.

## PARCEL 2:

A parcel of land in the NE¼ of Section 23, Township 13 North,  
Range 43, East of the Boise Meridian, lying South of and adjacent  
to the South lines of Buffalo River Estates, Division #2, Fremont County,  
Idaho, described as follows:

Beginning at the Southeast corner of Lot 15, Block 6 of Buffalo River  
Estates, Division #2;

Thence South 89° 44' 48" West, 100.58 feet to the Southwest corner of  
said Lot 15;

Thence South 0° 15' 12" East, 118.39 feet to a point of curve with a  
radius of 30.00 feet;

Thence to the left along said curve 47.24 feet through a central angle  
of 90° 13' 42";

Thence North 89° 44' 48" East, 71.05 feet;

Thence North 0° 15' 12" West, 148.51 feet TO THE POINT OF  
BEGINNING.

KMB

K.N.C.





**Settlement Statement**  
Optional Form for  
Transactions without

U.S. Department of Housing  
and Urban Development

OMB Approval No. 2502-0491

|   |  |   |  |
|---|--|---|--|
| Name & Address of Borrower: <b>KRYSTAL M. BARRETT; KELLY N. CLAY</b><br>895 EAST 11TH STREET<br>IDAHO FALLS, ID 83404 |  | Name & Address of Lender: <b>THE BANK OF COMMERCE-NORTHGATE</b><br>1020 NORTHGATE MILE<br>IDAHO FALLS, ID 83401                             |  |
| Property Location: (if different from above)<br>4058 STEELHEAD DRIVE, ISLAND PARK, ID 83421                           |  | Settlement Agent: <b>ALLIANCE TITLE AND ESCROW</b><br>Place of Settlement:  |  |
| Loan Number:  |  | Settlement Date: <b>12-07-2005</b>  |  |
| <b>L. SETTLEMENT CHARGES</b>  |  | <b>M. DISBURSEMENT TO OTHERS</b>  |  |
| 800. Items Payable In Connection With Loan  |  | 1501.   |  |
| 801. Loan origination fee      % to   |  |   |  |
| 802. Loan discount      % to  |  |   |  |
| 803. Appraisal fee to   |  | 100.00 1502.  |  |
| 804. Credit report to   |  |   |  |
| 805. Inspection fee to  |  |   |  |
| 806. Mortgage insurance application fee to  |  | 1503.   |  |
| 807. Mortgage broker fee to   |  |   |  |
| 808.  |  |   |  |
| 809. FLOOD MONITORING   |  | 15.00 1504.   |  |
| 810.  |  |   |  |
| 811.  |  |   |  |
| 900. Items Required By Lender To Be Paid In Advance   |  | 1505.   |  |
| 901. Interest from      to      @ \$      /day  |  |   |  |
| 902. Mortgage insurance premium for      pymt. periods to   |  | 1506.   |  |
| 903. Hazard insurance premium for      years to   |  |   |  |
| 904. CREDIT INS. PREM.      years to  |  | 1507.   |  |
| 905.  |  |   |  |
| 906.  |  | 1508.   |  |
| 1000. Reserves Deposited With Lender  |  |   |  |
| 1001. Hazard insurance      pymt. periods @ \$      per period  |  |   |  |
| 1002. Mortgage insurance      pymt. periods @ \$      per period  |  | 1509.   |  |
| 1003. City property taxes      pymt. periods @ \$      per period   |  |   |  |
| 1004. County property taxes      pymt. periods @ \$      per period   |  |   |  |
| 1005. Annual assessments      pymt. periods @ \$      per period  |  | 1510.   |  |
| 1006.      pymt. periods @ \$      per period   |  |   |  |
| 1007.      pymt. periods @ \$      per period   |  |   |  |
| 1008. Aggregate Adjustment  |  | 0.00 1511.  |  |
| 1100. Title Charges   |  |   |  |
| 1101. Settlement or closing fee to  |  |   |  |
| 1102. Abstract or title search to   |  | 1512.   |  |
| 1103. Title examination to  |  |   |  |
| 1104. Title insurance binder to   |  |   |  |
| 1105. Document preparation to   |  | 250.00 1513.  |  |
| 1106. Notary fees to  |  |   |  |
| 1107. Attorney's fees to<br>(includes above item numbers      )   |  | 1514.   |  |
| 1108. Title insurance to<br>(includes above item numbers      )   |  | 85.00 1515.   |  |
| 1109. Lender's coverage      \$   |  |   |  |
| 1110. Owner's coverage      \$  |  |   |  |
| 1111. OFFICIALS TO  |  | 12.00   |  |
| 1112.   |  |   |  |
| 1113.   |  | 1520. TOTAL DISBURSED<br>(enter on line 1603)   |  |
| 1200. Government Recording And Transfer Charges   |  |   |  |
| 1201. Recording fees:<br>MTG \$15.00-B  |  | 15.00   |  |
| 1202. City/county tax/stamps:   |  | 1600. Loan Amount      \$      20,477.00  |  |
| 1203. State tax/stamps:   |  |   |  |
| 1204.   |  | 1601. PLUS Cash/Check from<br>Borrower      \$  |  |
| 1205.   |  |   |  |
| 1300. Additional Settlement Charges   |  | 1602. MINUS Total Settlement<br>Charges (line 1400)      \$      477.00   |  |
| 1301. Survey to   |  |   |  |
| 1302. Pest inspection to  |  | 1603. MINUS Total Disburse-<br>ments to Others (line 1520)      \$  |  |
| 1303. Architectural/engineering services to   |  |   |  |
| 1304. Building permit to  |  | 1604. EQUALS Disbursements to<br>Borrower (after expiration<br>of any applicable revision<br>period required by law)      \$      20,000.00 |  |
| 1305.   |  |   |  |
| 1306.   |  |   |  |
| 1307.   |  |   |  |
| (enter on line 1602)  |  | 477.00  |  |

Sign receipt of a completed copy of this statement and any attachments

*Willet 12-13-05*  
BY \_\_\_\_\_

*Kelly N. Clay*  
Date \_\_\_\_\_ Borrower **KELLY N. CLAY**  
Date **12-13-05**

|  |  |  |
|--|--|--|
| APPLICANT'S NAME AND CURRENT ADDRESS<br>KRYSTAL M. BARRETT<br>KELLY N. CLAY<br>895 EAST 11TH STREET<br>IDAHO FALLS, ID 83404 | APPLICATION SUBMITTED TO<br>(AND THESE DISCLOSURES MADE BY):<br>THE BANK OF COMMERCE-NORTHGATE<br>1020 NORTHGATE MILE<br>IDAHO FALLS, ID 83401 | Application Number <b>4001853289</b><br>Application Received <b>11-30-2005</b><br>By <input type="checkbox"/> Mail <input checked="" type="checkbox"/> In Person<br>Date of Disclosure <b>11-30-2005</b> |
|--|--|--|

### SERVICING DISCLOSURE STATEMENT

NOTICE TO FIRST LIEN MORTGAGE LOAN APPLICANTS: THE RIGHT TO COLLECT YOUR MORTGAGE LOAN PAYMENTS MAY BE TRANSFERRED. FEDERAL LAW GIVES YOU CERTAIN RELATED RIGHTS. IF YOUR LOAN IS MADE, SAVE THIS STATEMENT WITH YOUR LOAN DOCUMENTS. SIGN THE ACKNOWLEDGMENT AT THE END OF THIS STATEMENT ONLY IF YOU UNDERSTAND ITS CONTENTS.

Because you are applying for a mortgage loan covered by the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. §2601 *et seq.*) you have certain rights under that Federal law.

This statement tells you about those rights. It also tells you what the chances are that the servicing for this loan may be transferred to a different loan servicer. "Servicing" refers to collecting your principal, interest and escrow account payments, if any. If your loan servicer changes, there are certain procedures that must be followed. This statement generally explains those procedures.

#### Transfer Practices and Requirements

If the servicing of your loan is assigned, sold, or transferred to a new servicer, you must be given written notice of that transfer. The present loan servicer must send you notice in writing of the assignment, sale or transfer of the servicing not less than 15 days before the effective date of the transfer. The new loan servicer must also send you notice within 15 days after the effective date of the transfer. The present servicer and the new servicer may combine this information in one notice, so long as the notice is sent to you 15 days before the effective date of transfer. The 15 day period is not applicable if a notice of prospective transfer is provided to you at settlement. The law allows a delay in the time (not more than 30 days after a transfer) for servicers to notify you, upon the occurrence of certain business emergencies.

Notices must contain certain information. They must contain the effective date of the transfer of the servicing of your loan to the new servicer, and the name, address, and toll-free or collect call telephone number of the new servicer, and toll-free or collect call telephone numbers of a person or department for both your present servicer and your new servicer to answer your questions. During the 60-day period following the effective date of the transfer of the loan servicing, a loan payment received by your old servicer before its due date may not be treated by the new loan servicer as late, and a late fee may not be imposed on you.

#### Complaint Resolution

Section 6 of RESPA (12 U.S.C. §2605) gives you certain consumer rights, whether or not your loan servicing is transferred. If you send a "qualified written request" to your servicer, your servicer must provide you with a written acknowledgment within 20 Business Days of receipt of your request. "qualified written request" is a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, which includes your name and account number, and the information regarding your request. Not later than 60 Business Days after receiving your request, your servicer must make any appropriate corrections to your account, or must provide you with a written clarification regarding any dispute. During this 60-Business Day period, your servicer may not provide information to a consumer reporting agency concerning any overdue payment related to such period or qualified written request.

A Business Day is any day in which the offices of the business entity are open to the public for carrying on substantially all of its business operations.

#### Images and Costs

Section 6 of RESPA also provides for damages and costs for individuals or classes of individuals in circumstances where servicers are shown to have violated the requirements of that Section.

#### Servicing Transfer Estimates

The following is the best estimate of what will happen to the servicing of your mortgage loan:

- A. ☒ We may assign, sell or transfer the servicing of your loan while the loan is outstanding.  
 We are able to service your loan, and we ☒ will ☐ will not ☐ haven't decided whether to service your loan.
- B. ☐ We do not service mortgage loans (☐ and we have not serviced mortgaged loans in the past three years). We presently intend to assign, sell or transfer the servicing of your mortgage loan. You will be informed about your servicer.
- C. ☒ We assign, sell or transfer the servicing of some of our loans while the loan is outstanding depending on the type of loan and other factors.  
 For the program for which you have applied, we expect to ☐ sell all of the mortgage servicing ☒ retain all of the mortgage servicing ☐ assign, sell or transfer \_\_\_\_\_ % of the mortgage servicing.
- D. ☐

For all the first lien mortgage loans that we make in the 12 month period after your mortgage loan is funded, we estimate that the percentage of such loans for which we will transfer servicing is between:

N/A 0 to 25% N/A 26 to 50% X 51 to 75% N/A 76 to 100%

This estimate ☒ does ☐ does not include assignments, sales or transfers to affiliates or subsidiaries. This is only our best estimate and it is not binding. Business conditions or other circumstances may affect our future transferring decisions.

- A. ☒ We have previously assigned, sold or transferred the servicing of first lien mortgage loans.
- B. ☒ This is our record of transferring the servicing of the first lien mortgage loans we have made in the past three years. The percentages have been rounded to the nearest quartile - 0%, 25%, 50%, 75% or 100%.

2002 - 50 %

2003 - 50 %

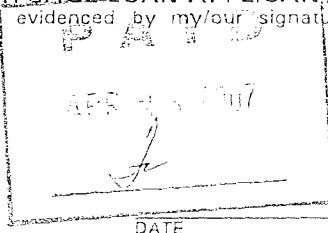
2004 - 50 %

This information ☒ does ☐ does not include assignments, sales or transfers to affiliates or subsidiaries.)

### ACKNOWLEDGMENT OF MORTGAGE LOAN-APPLICANT

I have read this disclosure form, and understand its contents, as evidenced by my/our signature(s) below. I/we understand that this acknowledgment is a required part of the mortgage loan application.

*Krystal M. Barrett*  
 KANT KRYSTAL M. BARRETT



11-30-2005

DATE

DATE AND PARTIES: Date of this Agreement to Provide Insurance (Agreement) is 12-07-2005 The parties and their addresses are:

OWNER: KRYSTAL M. BARRETT  
KELLY N. CLAY  
895 EAST 11TH STREET  
IDAHO FALLS, ID 83404

SECURED PARTY: THE BANK OF COMMERCE NORTHGATE  
1020 NORTHGATE MILE  
IDAHO FALLS, ID 83401

The pronouns "you" and "your" refer to the Secured Party. The pronouns "I," "me" and "my" refer to each person or entity signing this Agreement as Owner.

1. LOAN, LEASE, OR CONTRACT DESCRIPTION (Loan).

A. Date: 12-07-2005  
B. Loan Number:  
C. Loan Amount: 20,477.00  
D. Additional Information:

2. AGREEMENT TO PROVIDE INSURANCE. As part of my Loan, I agree to do all of the following (in addition to any requirements specified in the Loan documents):  
A. I will insure the Property as listed and with the coverages shown in the COVERAGES section.  
B. I will have you named on the policy, with the status listed under the STATUS section.  
C. I will arrange for the insurance company to notify you that the policy is in effect and your status has been noted.  
D. I will pay for this insurance, including any fee for this endorsement.  
E. I will keep the insurance in effect until the Property is no longer subject to your security interest. (I understand that the Property may incur damage in addition to any listed in the LOAN DESCRIPTION section.)

3. DESCRIPTION OF PROPERTY. The Property subject to this Agreement is described as follows.

PROPERTY LOCATED AT 4058 STEELHEAD DRIVE, ISLAND PARK, IDAHO, AND 1958 SCHUBS TL MOBILE HOME VIN V 56660

4. COVERAGES. I agree to insure the Property according to the following described risks, amount of coverage, and maximum deductible allowed.

☒ If checked, all coverages will be for the full replacement value of the Property.

Homeowner's Coverage: ☐ H.O. ☐ Other (Describe) \_\_\_\_\_

Insurable Value: \_\_\_\_\_

Deductible: \_\_\_\_\_

Automobile Coverages: ☐ Fire ☐ Theft ☐ Collision ☐ Comprehensive ☐ Liability ☐ Other \_\_\_\_\_

Insurable Value: \_\_\_\_\_

Deductible: \_\_\_\_\_

Minimum Limits: \_\_\_\_\_

Property Coverage: ☒ Fire ☒ Theft ☐ Collision ☐ Comprehensive ☒ Liability ☐ Other \_\_\_\_\_

Insurable Value: \_\_\_\_\_

Deductible: 500.00

5. STATUS. Your status shall be listed on the insurance policy as follows:

☐ Lienholder ☐ Certificate Holder ☐ Additional Insured ☒ Mortgagee ☐ Other \_\_\_\_\_

California Real Property: Hazard Insurance exceeding the replacement value of the improvements on the property is not required as a condition of this loan.

6. ADDITIONAL TERMS.

7. INSURANCE COMPANY. The insurance policy covering the Property and the insurance company issuing the policy are as follows:

A. Policy Number: \_\_\_\_\_ Effective From \_\_\_\_\_ To \_\_\_\_\_  
B. Insurance Company Name, Address, and Phone Number: \_\_\_\_\_

8. INSURANCE AGENCY AND AGENT. The insurance agency through which I have purchased, or intend to purchase, the required insurance is as follows:

A. Agent Name: \_\_\_\_\_  
B. Agency Name, Address, and Phone Number: \_\_\_\_\_

9. SIGNATURES.

SIGNATURES FOR OWNER(S) AND AUTHORIZATION TO INSURANCE AGENT AND COMPANY. By signing below, I agree to the terms contained in this Agreement and acknowledge receipt of a copy of this Agreement. I request the listed insurance company and agency to provide the indicated coverage and list you on the policy with the indicated status. I also request the insurance company or its authorized agent to immediately confirm that the policy is in effect by signing this form and forwarding a copy of the policy to you.

X Krystal M. Barrett  
KRYSTAL M. BARRETT  
X Kelly N. Clay  
KELLY N. CLAY

12-13-05  
Date  
12-13-05  
Date

SIGNATURE FOR SECURED PARTY AND REQUEST FOR CONFIRMATION. Upon receipt of this Agreement, the insurance company or agency named above is requested to confirm the policy coverages shown above.

By X Nolan C. Lee  
NOLAN C. LEE, VICEPRESIDENT

12-13-2005  
Date

SIGNATURE FOR INSURANCE COMPANY AND CONFIRMATION. By signing below, insurance Company confirms the existence of the insurance coverages agreed to be provided by this Agreement and that you will be notified not less than 10 days before cancellation.

APR 10 2006  
Date



THE BANK OF COMMERCE-NORTHGATE  
1020 NORTHGATE MILE  
IDAHO FALLS, ID 83401

KRYSTAL M. BARRETT  
KELLY N. CLAY  
895 EAST 11TH STREET  
IDAHO FALLS, ID 83404

Loan Number 4001853289  
Date 12-07-2005  
Loan Amount \$ 20,477.00

LENDER'S NAME AND ADDRESS

BORROWER'S NAME AND ADDRESS

### ERRORS AND OMISSIONS AGREEMENT

The undersigned borrower(s), in consideration of the closing of a certain loan by THE BANK OF COMMERCE-NORTHGATE  
the "Lender" to KRYSTAL M. BARRETT; KELLY N. CLAY

"Borrower(s)" in the above stated  
amount, as evidenced by a promissory note and secured by a Deed of Trust or mortgage against real property located at 4058 STEELHEAD  
DRIVE, ISLAND PARK, ID 83421

and dated the date of this Errors and Omissions Agreement, agree(s), if requested by the "Lender" or its agent, to fully cooperate in the correction, if necessary in the reasonable discretion of the "Lender" of any and all loan closing documents so that all documents accurately describe the loan between the undersigned borrower(s) and the "Lender" and thus allow the "Lender" to sell, convey, seek a guaranty or obtain insurance for, or market said loan to any purchaser, including but not limited to any investor or institution, The Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Department of Housing and Urban Development, the Department of Veterans Affairs, or Municipal Bonding Authority.

The undersigned borrower(s) further agree(s) to comply with all above noted reasonable requests by the "Lender" within thirty (30) days from the date of the mailing of the correction requests by the "Lender". The undersigned borrower(s) agree(s) to assume all costs including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with the "Lender" requests within the specified thirty (30) days.

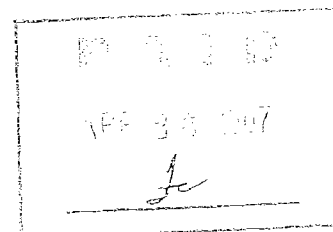
DATED this 7TH day of DECEMBER, 2005

Krystal M. Barrett  
Borrower) KRYSTAL M. BARRETT

Kelly N. Clay  
Borrower) KELLY N. CLAY

Borrower)

Borrower)



# CONSUMER ACCOUNT AGREEMENT

THE BANK OF COMMERCE

**IMPORTANT ACCOUNT OPENING INFORMATION:** Federal law requires us to obtain sufficient information to verify your identity. You may be asked several questions and to provide one or more forms of identification to fulfill this requirement. In some instances we may use outside sources to confirm the information. The information you provide is protected by our privacy policy and federal law.

## OWNERSHIP OF ACCOUNT - CONSUMER

☒ INDIVIDUAL ☐ (and not as tenants in common or community property) ☐ JOINT - NO SURVIVORSHIP (as tenants in common)

☐ JOINT - WITH SURVIVORSHIP ☐ COMMUNITY PROPERTY - NO SURVIVORSHIP

☐ TRUST - SEPARATE AGREEMENT

☐ REVOCABLE TRUST OR ☐ PAY-ON DEATH DESIGNATION AS DEFINED IN THE ACCOUNT TERMS AND CONDITIONS. Name and Address of Beneficiaries:

DATE OPENED DECEMBER 13, 2005 OPENED BY LLB

INITIAL DEPOSIT \$ 20,000.00 FORM: ☒ CASH ☐ CASHIERS CHECK

Form of Identification:

Name and address of someone who will always know your location:

All new Accounts will be verified through: CHEX SYSTEMS

## ADDITIONAL INFORMATION:

TYPE AND NUMBER OF ACCOUNT ☒ CHECKING ☐ ☐ ☐

The specified ownership will remain the same for all accounts. ☒ New Account ☐ Existing Account

## ACCOUNT OWNER NAME & ADDRESS

KRYSTAL BARRETT  
395 E 11TH ST  
IDAHO FALLS, IDAHO 83404

11-0118479-5  
INTERNAL USE

NUMBER OF SIGNATURES REQUIRED FOR WITHDRAWAL 1

☐ This is a Temporary account agreement.

**SIGNATURE(S) - THE UNDERSIGNED AGREE(S) TO THE TERMS OF, AND ACKNOWLEDGE(S) RECEIPT ON TODAY'S DATE OF A COMPLETED COPY OF, THIS DOCUMENT, THE ACCOMPANYING TERMS AND CONDITIONS AND THE DISCLOSURE(S) INDICATED BELOW.**

☒ Funds Availability ☒ Electronic Fund Transfers ☐ Truth in Savings

☒ Substitute Checks ☒ Privacy ☐

(1): KRYSTAL BARRETT

(2):

(3):

(4):

Signature(s)

Identifying Info.

☐ AUTHORIZED SIGNER (name):  
Individual Accounts Only

## BACKUP WITHHOLDING CERTIFICATIONS

TIN: 557-96-9122

☐ TAXPAYER I.D. NUMBER - The Taxpayer Identification Number shown above (TIN) is my correct taxpayer identification number.

☐ BACKUP WITHHOLDING - I am not subject to backup withholding either because I have not been notified that I am subject to backup withholding as a result of a failure to report all interest or dividends, or the Internal Revenue Service has notified me that I am no longer subject to backup withholding.

☐ EXEMPT RECIPIENTS - I am an exempt recipient under the Internal Revenue Service Regulations.

**SIGNATURE - I certify under penalties of perjury the statements checked in this section and that I am a U.S. person (including a U.S. resident alien).**

X [Signature] (Date)

# TAX INFORMATION INSTRUCTIONS

PLEASE FOLLOW CAREFULLY

## GENERALLY

We must now withhold the percentage allowed under the Internal Revenue Code of the taxable interest paid on this account if:

- 1) you fail to furnish your taxpayer identification number (TIN) to us, or
- 2) the Internal Revenue Service notifies us that you furnished an incorrect taxpayer identification number or
- 3) you are notified that you are subject to backup withholding because you have failed to report all interest and dividend payments, or
- 4) you fail to certify that you are not subject to backup withholding because of a failure to report all interest and dividend payments, or you fail to certify your taxpayer identification number.

## TAXPAYER IDENTIFICATION NUMBER

There are two types of taxpayer identification numbers:

- (a) **SOCIAL SECURITY NUMBERS** - These are nine digit numbers taking the form of 000-00-0000. Social Security Numbers identify and should be used by individual persons and estates of decedents.
- (b) **EMPLOYER IDENTIFICATION NUMBERS** - These are also nine digit numbers taking the form of 00-0000000. These numbers identify and should be used by corporations, partnerships, non-profit associations, certain trusts, and similar non-individual persons.

Generally speaking, interest or dividends earned on an account should be reported to the IRS under the name and taxpayer identification number of the person who owns the principal in the account. This person should report this interest on his income tax return.

Section 6109 of the Internal Revenue Code requires you to provide your taxpayer identification number to us whether or not you file a tax return. These numbers are used to identify the interest and dividends paid to you.

## BACKUP WITHHOLDING

To prevent backup withholding on the interest and dividend payments you receive, you must certify that the taxpayer identification number you provide is correct and that you are not subject to backup withholding because of a failure to report your interest and dividend payments. In order to make these certifications check the "TAXPAYER I.D. NUMBER" and "BACKUP WITHHOLDING" boxes on page 1 of this form and sign the certifications.

If you are subject to backup withholding, you should still provide and certify your taxpayer identification number.

## EXEMPT RECIPIENTS

Certain types of accounts are exempted from backup withholding and certain payments of interest are not subject to backup withholding. Review the descriptions of exempt payees set out below and check the "EXEMPT RECIPIENTS" box on page 1 if applicable, then sign the certification.

## NUMBER APPLIED FOR

If you have applied for (or intend to apply for) a number, write "Applied For" in the space for the TIN on page 1. When you receive your number, contact us to complete a new certification. If you do not provide us with your TIN within 60 days we are required to begin backup withholding.

If you do not have a taxpayer identification number or you do not know your number, contact the local office of the Social Security Administration or the Internal Revenue Service.

## NOTICE TO NONRESIDENT ALIENS

In order to prevent the reporting of your interest payments, you should provide your name, address, taxpayer identification number (if any) and certify under penalties of perjury your nonresident alien status. To do this you must provide a certification on a separate document. Failure to provide this certification may result in backup withholding.

## PENALTIES

In addition to the withholding, you may be subject to the following penalties:

- 1) If you fail to give us your correct taxpayer identification number, the IRS may impose a penalty of \$50 for each failure (unless your failure is due to reasonable cause and not willful neglect).
- 2) If you make a false statement which results in an avoidance of withholding or you make a false certification, you may be subject to civil penalties of up to \$500 and criminal penalties including fines and/or imprisonment.
- 3) If you fail to report all of your reportable interest and dividend payments, the IRS may impose a penalty of at least 5% of the underpayment of tax.

## Payees Exempt from Backup Withholding

We are not required to backup withhold if the payee is:

- An organization exempt from tax under section 501(c)(3) or an individual retirement plan.
- The United States or any of its agencies or instrumentalities.
- A state, the District of Columbia, a possession of the United States, or any of their political subdivisions, or instrumentalities.
- A foreign government or any of its political subdivisions, agencies, or instrumentalities.
- An international organization or any of its agencies or instrumentalities.

Other payees that may be exempt from backup withholding include:

- A corporation.
- A foreign central bank of issue.
- A dealer in securities or commodities required to register in the United States, the District of Columbia, or a possession of the United States.
- A futures commission merchant registered with the Commodity Futures Trading Commission.
- A real estate investment trust.
- An entity registered at all times during the tax year under the Investment Company Act of 1940.
- A common trust fund operated by a bank under section 584(a).
- A financial institution.
- A middleman known in the investment community as a nominee or custodian.
- A trust exempt from tax under section 664 or described in section 4947.

Payments of interest not generally subject to backup withholding include the following:

- Payments of interest on obligations issued by individuals. Note: You may be subject to backup withholding if this interest is \$600 or more and is paid in the course of the payer's trade or business and you have not provided your correct taxpayer identification number to the payer.
- Payments of tax-exempt interest (including exempt interest dividends under section 852).
- Payments described in section 6049(b)(5) to non-resident aliens.
- Payments on tax-free covenant bonds under section 1451.
- Payments made by certain foreign organizations.
- Payments of mortgage or student loan interest.

Exempt payees described above should complete this form to avoid possible erroneous backup withholding. Certain payments exempt from backup withholding are nevertheless subject to information reporting. If you file this form with the payer, furnish your taxpayer identification number and certify the correctness of that number and certify that you are an exempt recipient.

Certain payments other than interest, dividends, and patronage dividends that are not subject to information reporting are also not subject to backup withholding. For details see the regulations under sections 8041, 8041A(f), 6045, and 6050A.

589-6706

Request for Reconveyance

To: Alliance Title & Escrow Corp., 130 E. Main Street, Rexburg, Idaho

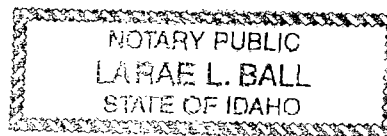
The Bank of Commerce - Northgate is the legal owner and holder of all indebtedness secured by that certain Deed of Trust dated December 7, 2005, and recorded December 13, 2005, as Fremont County Instrument Number 499643. All sums secured have been fully paid. You are hereby requested and directed to cancel all evidence of indebtedness secured by said Deed of Trust and to reconvey, without warranty, the estate now held by you under the same. Please deliver said reconveyance to Kelly N. Clay, c/o Fuller & Carr, P.O. Box 50935, Idaho Falls, Idaho 83405-0935.

THE BANK OF COMMERCE - NORTHGATE

By: [Signature]  
Its: [Signature]

SUBSCRIBED AND SWORN to before me this 26<sup>th</sup> day of April, 2007.

[Signature]  
Notary public for Idaho  
Residing at: IDAHO FALLS, ID  
My commission expires: 11-09-12



# EXHIBIT D



March 2, 2007

Kelly N. Clay  
4470 North 25<sup>th</sup> East  
Idaho Falls, Idaho 83401

RE: Loan No. 4001853289

Dear Kelly:

The above referenced loan is currently past due two payments plus late charges making a total past due amount of \$601.08.

As a joint signer with Krystal M. Barrett on this loan, you are also responsible for the payment terms on the loan. Please make arrangements to bring this loan current.

Please make your payment to The Bank of Commerce, P. O. Box 1887, Idaho Falls, Idaho 83403 or drop it by the office at 1455 Northgate Mile, Idaho Falls, Idaho. If you have any questions, please call me at 535-0640.

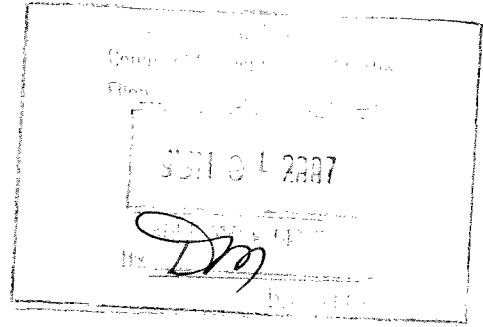
The Bank of Commerce

Nolan C. Lee

Vice President

fc

E.W. Pike (ISB 650)  
Erika Lessing (ISB 6797)  
E. W. PIKE & ASSOCIATES, P.A.  
151 N. Ridge Ave., Suite 210  
P.O. Box 2949  
Idaho Falls, ID 83403-2949  
Telephone: 208/528-6444  
Telefax: 208/528-6447



Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

vs.

KELLY N. CLAY, an individual,  
BRP, INCORPORATED, an Idaho  
corporation, and THE BANK OF  
COMMERCE, an Idaho Banking  
corporation,

Defendants.

Case No. CV-07-306

**AMENDED COMPLAINT**

Plaintiff Krystal M. Kinghorn f/k/a Krystal M. Barrett ("Krystal"), through her attorneys,  
complains of Defendants as follows:

**JURISDICTION**

1. Krystal is a resident of the State of Idaho, and has so resided during all times material hereto.
2. Defendant Kelly Clay ("Clay") is an individual residing in Bonneville County, Idaho.
3. Defendant BRP, Incorporated ("BRP") is an Idaho corporation.

*Amended*

4. Defendant The Bank of Commerce (“Bank”) is an Idaho banking corporation with its principal place of business located in Idaho Falls, Idaho.

5. The real property at issue herein is located in Fremont County, Idaho.

6. Jurisdiction is proper in the District Court of the Seventh Judicial District, Fremont County, Idaho.

### **GENERAL ALLEGATIONS**

7. On or about May 12, 2000, Krystal purchased real property located at Lot 15, Block 6, Buffalo River Estates Division No. 2, Fremont County, Idaho (more particularly described on Exhibit “A,” annexed hereto) (“the Property”) from Tom and Raeona Nugent.

8. The Property was conveyed by Warranty Deed to Krystal and her husband, Todd D. Barrett. *See* Exhibit “A,” annexed hereto.

9. Thereafter, on or about August 29, 2005, Todd D. Barrett executed a Quitclaim Deed in favor of Krystal on the Property, which was duly recorded in the records of Fremont County as Instrument No. 463121.

10. In the fall of 2005, Krystal and her then-husband, Todd D. Barrett, were involved in divorce proceedings.

11. By reason thereof, Krystal was in desperate financial circumstances, and was in a fragile emotional condition.

12. Krystal and Clay were good friends in the fall of 2005.

13. Krystal confided in Clay, and he was aware of Krystal’s desperate financial circumstances and emotionally fragile condition.

14. On or about November 30, 2005 Krystal made application to the Bank for a \$20,000.00 loan, and agreed to pledge the Property, together with a mobile home located on the



Property, as security for said loan.

15. At that time, Krystal owned the Property, free and clear of encumbrances.

16. The Property was worth approximately \$80,000.00 at that time.

17. The Bank required a co-signator for the loan, in addition to a Deed of Trust on the Property.

18. Krystal discussed her difficulty in obtaining the loan with Clay and Clay offered to co-sign on the loan.

19. Clay represented to Krystal that he wanted to help her, and that he was willing to make one or two payments on the loan if she was unable to do so, and that she could pay him back over time.

20. Clay caused documents to be prepared, including a Loan Guarantee Agreement, a Deed of Trust in his favor and a Quitclaim Deed. *See* Exhibit "B," annexed hereto.

21. The documents were prepared by Clay's attorney, Mark Fuller. Krystal was not represented by counsel.

22. Loan documents, including a Deed of Trust in favor of the Bank, were prepared by the Bank.

23. On or about December 13, 2005, Krystal went to the Bank and executed the Bank loan documents (annexed hereto as Exhibit "C") and the documents prepared by Clay's attorney.

24. Among the documents executed by Krystal on December 13, 2005, was a Deed of Trust in favor of the Bank. The Deed of Trust lists, as Grantors, Krystal M. Barrett and Kelly N. Clay, notwithstanding the fact that Krystal was the sole owner of the property and Clay had no interest or title to said property. Krystal and Clay both executed the Deed of Trust as Grantors. *See* Exhibit "C," annexed hereto.

25. The acknowledgement portion of the Deed of Trust in favor of the Bank reflects that the Deed of Trust was executed on December 13, 2005 and acknowledged on December 7, 2005.

26. The Deed of Trust was notarized by Bank officer Nolan Lee.

27. Krystal received the sum of \$20,477.00 as proceeds from the loan. Nolan Lee, an officer of the Bank, represented to Krystal that the documents she was signing constituted a standard loan package. He did not advise Krystal to seek legal counsel before signing the documents prepared by Clay's attorney, nor did he explain the documents to Krystal.

28. Nolan Lee notarized Krystal's signature on all documents she signed in connection with the transaction, including documents prepared by Clay's attorney, Mark Fuller.

29. At no time did Krystal intend to absolutely convey her interest in the Property to Clay.

30. For a period of approximately one year, Krystal made installment payments of \$270.25 on the loan to the Bank. Said payments were due on the 25<sup>th</sup> day of each month, with a 15-day grace period.

31. On or about March 2, 2007, Nolan Lee sent written notice to Clay that Krystal had missed two payments on her loan with the Bank. At that time, Krystal was within the 15-day grace period for the February payment. *See* Exhibit "D," annexed hereto.

32. Nolan Lee did not send notice to Krystal of the missed payment(s), nor did he send a copy of his letter to Clay to Krystal.

33. On or about March 8, 2007, Clay voluntarily paid two payments to the Bank. The February payment was not yet outside the 15-day grace period at the time Clay made his voluntary payment.

34. Clay did not inform Krystal that he had received notice of the missed payment(s) from the Bank, or that he was paying the missed payment(s) to the Bank.

35. On or about March 9, 2007, Clay recorded the Quitclaim Deed on the Property executed by Krystal on December 13, 2005.

36. Clay did not give Krystal notice that he had recorded the Quitclaim Deed.

37. On or about May 3, 2007, Clay sold the Property to BRP.

38. Clay had a business relationship with one of the officers of BRP, Doyle Beck.

39. Mark Fuller, who acted as Clay's attorney at all times material hereto, is the statutory registered agent for BRP.

40. Clay did not give Krystal notice that he sold the Property to BRP.

#### **COUNT I – MORTGAGE AND REDEMPTION**

41. Krystal re-alleges paragraphs 1-40 set forth above.

42. That on the 13<sup>th</sup> day of December, 2005, Krystal, to secure the co-signature of Clay on a certain note given by Krystal and Clay to the Bank, executed and delivered to Clay a Quitclaim Deed to real property located in Fremont County. *See* Exhibit "B," annexed hereto.

43. Krystal was then the owner and in possession of the real property, located in Fremont County, and particularly described in Exhibit "A."

44. That the Quitclaim Deed, although absolute in form, was intended by both Krystal and Clay to be a mortgage only, and to stand as security for the repayment of said loan, and to serve no other purpose. *See* Loan Guarantee Agreement, Exhibit "B."

45. The note given by Krystal and co-executed by Clay to the Bank was for the principal sum of \$20,477.00.

46. At the time said note was given, the real property owned by Krystal and which is

the subject of this action, was worth approximately \$80,000.00.

47. At the time said note was given, there were no other encumbrances on the Property.

48. At the time said note was given, Krystal was in desperate financial circumstances, and Clay encouraged Krystal to enter into the subject transaction. Krystal acquiesced because of her necessitous condition.

49. The Loan Guarantee Agreement represents that the Quitclaim Deed was given to secure Clay's position as a co-signor on the loan to the Bank.

50. Clay, through his attorney, Mark Fuller, caused the Quitclaim Deed to be recorded in the office of the recorder of deeds of Fremont County on March 9, 2007.

51. Krystal is ready to pay whatever may be justly due on said loan, and hereby offers to bring the money into court for that purpose.

## **COUNT II – CONSTRUCTIVE TRUST**

52. Krystal re-alleges paragraphs number 1-51 set forth above.

53. Clay obtained title to the Property through fraud, misrepresentations, and under circumstances rendering it unconscionable for Clay to retain title to the Property.

54. Clay has an equitable and legal duty to reconvey the Property to Krystal upon repayment of the loan amounts he has advanced.

55. Clay would be unjustly enriched if her were permitted to retain the Property.

56. Clay stood in a confidential relationship to Krystal, and breached that relationship.

57. A constructive trust should be imposed.

### COUNT III - INVALID TRANSFER

58. Krystal re-alleges paragraphs 1-57 set forth above.

59. That on or about May 3, 2007, Clay sold the real property to BRP, notwithstanding Krystal's right of redemption on the Property.

60. Krystal is informed and believes that Clay received the sum of \$30,000.00 from BRP for the Property.

61. The sum of \$30,000.00 was not the fair market value of the Property on May 3, 2007.

62. Krystal believes that the Property is now worth \$80,000.00 to \$100,000.00.

63. Clay's attorney, Mark Fuller, is the statutory registered agent for BRP, and Clay has a business relationship with officer(s) of BRP.

64. BRP had actual or constructive knowledge of the defects in Clay's title to the Property.

65. BRP had actual or constructive knowledge that Clay committed a breach of constructive trust.

66. Notwithstanding BRP's actual or constructive knowledge of the title defects and Clay's breach of trust, BRP participated in the sale and bought the Property for an amount substantially below fair market value.

67. BRP is not a *bona fide* purchaser in good faith, for value, of the Property.

68. The transfer to BRP should be set aside, and the Property, together with any income derived therefrom, should be returned to Clay, in trust for Krystal, and reconveyed to Krystal upon payment of amounts due on the loan.

#### **COUNT IV - FRAUD**

69. Krystal re-alleges paragraphs number 1-68 set forth above.

70. Clay was well-aware of Krystal's fragile emotional and financial state at the time the documents herein were executed.

71. Clay took advantage of Krystal's fragile emotional and financial state.

72. Clay knowingly and falsely represented to Krystal that he would make payments if she was unable to do so, and that he would allow her to repay him over time.

73. Clay knowingly and fraudulently transferred the Property to BRP, without notice to Krystal.

74. Clay knowingly and fraudulently attempted to abrogate Krystal's right of redemption in the Property.

75. Clay violated his confidential relationship with Krystal.

76. Based upon the actions of Clay, Krystal has been damaged in an amount to be proven at trial.

#### **COUNT V – SLANDER OF TITLE**

77. Krystal re-alleges paragraphs number 1-76 set forth above.

78. The Bank caused a Deed of Trust to be prepared, in its favor, listing Krystal and Clay as Grantors.

79. The Bank knew, at the time it prepared the Deed of Trust, Clay had no interest in the Property.

80. On the face of the Deed of Trust, it appears that the Bank, through its officer, Nolan Lee, notarized the Deed of Trust on December 7, 2005, prior to the date it was executed (December 13, 2005).

81. The Bank designated Alliance Title & Escrow Corporation as Trustee on the Deed of Trust.

82. The Bank caused the false Deed of Trust to be recorded in the records of Fremont County.

83. On or about May 14, 2007, after the loan to the Bank was paid in full, the Bank, through its designated Trustee, Alliance Title & Escrow Corporation, recorded a Deed of Reconveyance to the Property. A true and correct copy of the Deed of Reconveyance is annexed hereto as Exhibit "E."

84. The Deed of Reconveyance reconveys the property to Krystal and Clay, "pursuant to a written request made by the beneficiary." The Bank was the beneficiary on the Deed of Trust being reconveyed.

85. The Bank acted in reckless disregard for the truth or falsity of the matters published on the Deed of Trust and Deed of Reconveyance.

86. The Deed of Trust and Deed of Reconveyance caused Clay's name to be added to the title of the property, and constituted a cloud on the title of said property.

87. Krystal has been damaged by the actions of the Bank in an amount to be proven at trial.

#### **COUNT VI – COVENANT OF GOOD FAITH AND FAIR DEALING**

88. Krystal re-alleges paragraphs number 1-87 set forth above.

89. Krystal relied upon the counsel and advice of the Bank and in particular, its officer, Nolan Lee.

90. On or about December 13, 2005, the Bank accepted a Deed of Trust from Krystal and Clay as co-grantors, notwithstanding the fact that Clay had no interest in the subject

Property.

91. Nolan Lee falsely represented to Krystal that the documents he presented her to sign were a normal loan package.

92. Nolan Lee failed to send proper notices to Krystal of late payment(s), while sending notices of the same to Clay.

93. The Bank failed to honor Krystal's right of redemption in the Property, and re-conveyed the Property, together with title to the mobile home, to Clay.

94. Krystal relied upon Clay's verbal representations to her that he did not intend to take her Property, and that he would allow her to repay him if he helped her with any payments due on the loan.

95. Clay took advantage of Krystal's fragile emotional and financial position.

96. Clay failed to notify Krystal of communications he received from the Bank.

97. Clay voluntarily made payments to the Bank, in an effort to take advantage of Krystal.

98. Clay sold the Property to BRP without allowing Krystal to exercise her rights of redemption in the Property.

99. Krystal has been damaged by the actions of Clay and the Bank in an amount to be proven at trial.

#### **COUNT VII – AMBIGUOUS CONTRACT**

100. Krystal re-alleges paragraphs 1-99, set forth above.

101. The Loan Guarantee Agreement ("Agreement") states that "in the event Clay is required to make any payments whatsoever to the Bank of Commerce – Northgate that Clay may immediately record a Quit Claim Deed to the property. . . ."



102. The word “required” as utilized in the Agreement is not defined, and is reasonably subject to conflicting interpretation.

103. The Agreement does not define the word “required.”

104. The Agreement was prepared by Clay.

105. The Agreement should be construed in favor of Krystal and against Clay.

### **COUNT VIII – ATTORNEY FEES AND COSTS**

106. Krystal re-alleges paragraphs 1-105 set forth above.

107. Krystal has been required to obtain counsel to prosecute this action.

108. Krystal should be awarded her reasonable attorney fees and costs pursuant to Idaho Code §12-120 and § 12-121.

WHEREFORE, Krystal prays for relief as follows:

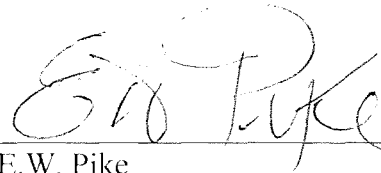
1. That the Quitclaim Deed to the Property be adjudged a mortgage.
2. That an account be taken of the amount due Clay, after deducting any rents or profits received, and that upon payment by Krystal of the amount found due, Clay be required to reconvey the Property to Krystal.
3. That a constructive trust be found to exist in favor of Krystal.
4. That the sale transaction between Clay and BRP be voided and set aside.
5. For damages, in an amount to be proven at trial, against the Bank for slander of title.
6. For damages, in an amount to be proven at trial, against Clay for breach of the covenant of good faith and fair dealing.
7. For damages, in an amount to be proven at trial, against the Bank for breach of the covenant of good faith and fair dealing.

8. For a finding that the Agreement between the parties is ambiguous, and should therefore be construed against Clay.

9. For her attorney fees and costs of suit incurred herein.

10. For such other and further relief as to the Court seems just and equitable in the premises.

DATED: May 21, 2007.

A handwritten signature in cursive script, appearing to read "E.W. Pike", written over a horizontal line.

E.W. Pike  
E.W. Pike & Associates, P.A.  
Attorneys for Plaintiffs

# EXHIBIT A

FILE No. \_\_\_\_\_

INSTRUMENT No. 462885

## WARRANTY DEED

FOR VALUABLE CONSIDERATION RECEIVED \_\_\_\_\_

TOM AND RAEONA NUGENT, HUSBAND AND WIFE, the Grantor,  
does hereby grant, bargain, sell and convey unto  
TODD D. AND KRYSTAL M. BARRETT, HUSBAND AND WIFE, the Grantee,  
whose current address is UCON, IDAHO 83454,  
the following described real estate situated in FREMONT County,  
State of Idaho, to-wit:

BUFFALO RIVER ESTATES DIVISION NO. 2  
LOT 15 BLK 6;  
SEC 23 TWP 13 RGE 43, FREMONT COUNTY, IDAHO

(SEE ATTACHED EXHIBIT "A")

TO HAVE AND TO HOLD the said premises, together with all tenements, hereditaments and appurtenances thereunto belonging, unto the said Grantee, his successors and assigns forever. Grantor does hereby covenant to and with the said Grantee that IT is the owner in fee simple of said premises and that IT will warrant and defend the same from all lawful claims whatsoever.

In construing this Deed and where the context so requires, the singular includes the plural and the masculine, the feminine and neuter.

DATED: 5-12-00

Tom Nugent  
Raeona Nugent

STATE OF IDAHO, County of \_\_\_\_\_

On this 12 day of May 2000  
before me, Janice Sharp, a  
Notary Public in and for the said State personally  
appeared

Tom and Raeona Nugent

Known to me to be the person(s) whose name(s)  
subscribed to the within instrument, and acknowl-  
edges to me that \_\_\_\_\_ executed the same.

Residing at St Anthony  
Comm. Expires 9/7/2005

THIS SPACE FOR COUNTY RECORDER'S USE ONLY.

Microfilm No. 462885  
12 Day 7 May 2000  
At 14:50 O'clock P M  
MICHE FUIKE

FREMONT CO. RECORDER 16 Deputy

Recorded in Request of  
Raeona Nugent  
Return to Barrett  
PO Box 392  
Ucon ID 83454



462885

EXHIBIT "A"

PARCEL 1: Lot 15, Block 6, Buffalo River Estates Division No. 2,  
Fremont County, Idaho, as per the recorded plat thereof.

PARCEL 2:

A parcel of land in the NE¼ of Section 23, Township 13 North,  
Range 43, East of the Boise Meridian, lying South of and adjacent  
to the South lines of Buffalo River Estates, Division #2, Fremont County,  
Idaho, described as follows:

Beginning at the Southeast corner of Lot 15, Block 6 of Buffalo River  
Estates, Division #2;

Thence South  $89^{\circ} 44' 48''$  West, 100.58 feet to the Southwest corner of  
said Lot 15;

Thence South  $0^{\circ} 15' 12''$  East, 118.39 feet to a point of curve with a  
radius of 30.00 feet;

Thence to the left along said curve 47.24 feet through a central angle  
of  $90^{\circ} 13' 42''$ ;

Thence North  $89^{\circ} 44' 48''$  East, 71.05 feet;

Thence North  $0^{\circ} 15' 12''$  West, 148.51 feet TO THE POINT OF  
BEGINNING.

# EXHIBIT B

## LOAN GUARANTEE AGREEMENT

THIS AGREEMENT made this 13 day of December, 2005, between Krystal M. Barrett, 895 East 11<sup>th</sup> Street, Idaho Falls, Idaho 83404, hereafter "Barrett", and Kelly N. Clay, 4470 N. 25<sup>th</sup> East, Idaho Falls, Idaho 83401, hereafter "Clay", pursuant to the terms set forth hereafter.

### RECITALS

WHEREAS, Barrett desires to obtain a loan in the amount of \$20,477.00 from the Bank of Commerce - Northgate, 1020 Northgate Mile, Idaho Falls, Idaho 83401, for the purpose of debt consolidation; and

WHEREAS, the Bank of Commerce - Northgate requires that Barrett obtain a co-signature on such loan, which shall be secured by a Deed of Trust recorded against real property owned by Barrett in Fremont County, Idaho, as more particularly described on Exhibit "A", attached hereto and incorporated by reference, together with improvements located on such property including a 1958 SCHU HS TL Mobile Home VIN V-58860; and

WHEREAS, Clay is willing to co-sign such loan, pursuant to the terms set forth hereafter, now, therefore,

IT IS HEREBY AGREED as follows:

1. Clay will co-sign the above-entitled loan in the total amount of \$20,477.00 with the Bank of Commerce - Northgate and stand as guarantor for such loan in the event Barrett fails to make timely payment.
2. Barrett agrees to make timely and proper payment on a monthly basis beginning January 25, 2006, in the amount of \$270.25 per month, and agrees to use all reasonable efforts to obtain the release of Clay as guarantor on such loan on or before January 1, 2007. Barrett agrees

to keep Clay informed throughout 2006 as to all efforts being made by Barrett to obtain the release of Clay as a guarantor on such loan.

3. Barrett shall issue a Deed of Trust to the benefit of Clay against the real property described on Exhibit "A" with Clay's security subservient only to the Bank of Commerce - Northgate in such amount as Clay shall be required to pay to the Bank of Commerce - Northgate, in the event payment is not timely made by Barrett.

4. Barrett agrees to make payment of \$350.00 to Clay's attorney, Mark R. Fuller of Fuller & Carr, within two (2) business days of receipt of the loan funds from the Bank of Commerce - Northgate. Barrett further agrees to pay any and all attorney fees which may be incurred by Clay to enforce this Agreement and the Deed of Trust issued to Clay.

5. Barrett further agrees that in the event Clay is required to make any payments whatsoever to the Bank of Commerce - Northgate that Clay may immediately record a Quit Claim Deed to the property described on Exhibit "A", transferring the property and improvements to Clay, subject to the Bank of Commerce - Northgate debt.

6. Barrett further warrants that no other claims of any type or nature, including Deeds of Trust, have been recorded against the property described on Exhibit "A".

IN WITNESS WHEREOF, the undersigned have executed this Agreement, on the date first above written.

Date:

12-13-05

Krystal M. Barrett  
Krystal M. Barrett

Date:

12-13-05

Kelly N. Clay  
Kelly N. Clay



508645

QUIT CLAIM DEED

GRANTOR, Krystal M. Barrett, of 895 E. 11<sup>th</sup> Street, Idaho Falls, Id. 83404, County of Bonneville, State of Idaho, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, does hereby REMISE, RELEASE, and forever QUITCLAIM, unto Kelly N. Clay, whose mailing address is 4470 N. 25<sup>th</sup> East, Idaho Falls, County of Bonneville, State of Idaho 83401 as GRANTEE, and to grantee's heirs and assigns forever, all of the following described real estate situated in Fremont County, State of Idaho:

LEGAL DESCRIPTION:

SEE EXHIBIT "A"

TOGETHER with all improvements, water, water rights, ditches, ditch rights, easements, tenements, hereditaments and appurtenances thereto.

IN WITNESS WHEREOF, Grantor has hereunto subscribed her name to this instrument this 13 day of Dec, 2005.

*Krystal M. Barrett*  
Krystal M. Barrett

STATE OF IDAHO )

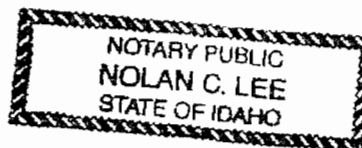
)ss.

County of Bonneville )

On this 13 day of December, 2005, before me, a Notary Public for Idaho, personally appeared Krystal M. Barrett, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that executed the same.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal the day and year first above written.

*Nolan C. Lee*  
Notary Public for Idaho  
Residing at: Idaho Falls  
My Commission Expires: 11-21-2007



## EXHIBIT "A"

PARCEL 1: Lot 15, Block 6, Buffalo River Estates Division No. 2, Fremont County, Idaho, as per the recorded plat thereof.

## PARCEL 2:

A parcel of land in the NE¼ of Section 23, Township 13 North, Range 43, East of the Boise Meridian, lying South of and adjacent to the South lines of Buffalo River Estates, Division #2, Fremont County, Idaho, described as follows:

Beginning at the Southeast corner of Lot 15, Block 6 of Buffalo River Estates, Division #2;

Thence South 89° 44' 48" West, 100.58 feet to the Southwest corner of said Lot 15;

Thence South 0° 15' 12" East, 118.39 feet to a point of curve with a radius of 30.00 feet;

Thence to the left along said curve 47.24 feet through a central angle of 90° 13' 42";

Thence North 89° 44' 48" East, 71.05 feet;

Thence North 0° 15' 12" West, 148.51 feet TO THE POINT OF BEGINNING.

508645

Microfilm No. 4 Day March 07  
 At 3:00 O'Clock P. M.  
 ABBIE MACE  
 FREMONT CO RECORDER  
 Fee \$ 0.50 Deputy  
 Recorded at Request of Fuller, Carr

## ALL INCLUSIVE DEED OF TRUST

BY THIS DEED OF TRUST, made this \_\_\_\_ day of December, 2005, BETWEEN Krystal M. Barrett herein called GRANTOR, whose address is: 895 E. 11<sup>th</sup> Street, Idaho Falls, Idaho 83404, Carr Land & Title Company, an Idaho Corporation, dba IDAHO TITLE AND TRUST, herein called TRUSTEE, and Kelly N. Clay, 4470 N. 25<sup>th</sup> East, Idaho Falls, Idaho 83401 herein called BENEFICIARY, Grantor grants, transfers, and assigns to Trustee, in trust, with power of sale, that property in Fremont County, Idaho, described as follows, either located within an incorporated city or village at the date hereof, or containing not more than twenty acres:

See Exhibit "A"

Grantor requests that any notice of default and any notice of sale hereunder be mailed to Grantor at the address herein set forth.

For the purpose of securing:

(1) Performance of the loan guarantee agreement of Grantor of even date herewith incorporated by reference or contained herein; (2) Payment of the indebtedness evidenced by one promissory note of even date herewith any extensions or renewals thereon in the principal sum of \$20,477.00 payable to Bank of Commerce - Northgate, final payment due December 10, 2010; (3) the payment of any money that may be advanced by the Beneficiary to Grantor, with interest thereon, evidenced by additional notes (indicating they are so secured) or by endorsement on the original note, executed by Trustor.

### A. TO PROTECT THE SECURITY HEREOF, GRANTOR AGREES:

(1) To perform the obligations secured by such included deeds of trust other than the payments to be made by Beneficiary as set forth in the note secured by this deed of trust. As between the parties herein and their successors and assigns, no assumption or guarantee agreement executed by Grantor for the benefit of the holders of the included notes shall be deemed to affect this obligation of Beneficiary.

(2) To keep said property in good condition and repair, not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay when due all claims for labor performed and materials furnished therefor; to comply with all laws affecting said property or requiring any alterations or improvements to be made thereon; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.

(3) To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or Beneficiary may release all or part thereof to Grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

(4) To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorney's fees, in a reasonable sum, in any such action or proceedings in which Beneficiary or Trustee may appear.

(5) To pay, at least ten days before delinquency all taxes and assessments affecting said property, including assessments on appurtenant water stock; when due, all encumbrances, charges and liens, except those payments to be made by Beneficiary as provided in the note secured hereby, with interest, on said property or any part thereof, which appear to be prior or superior hereto, all costs, fees and expenses of this Trust.

Should Grantor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Grantor and without releasing Grantor from any obligation hereof, may make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof. Beneficiary or trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceedings purporting to affect the security hereof or the rights or powers of the Beneficiary or Trustee; pay, purchase, contest or compromise any encumbrance, change or lien which in the judgment of either appears to be prior or superior hereto, and, in exercising any such powers pay necessary expenses, employ counsel and pay his reasonable fees.

(6) To pay immediately and without demand all sums expended by Beneficiary or Trustee, with interest from date of expenditure at the highest lawful rate permissible under Idaho law, and to pay for any statement provided for by law regarding the obligations secured hereby in the amount demanded by Beneficiary, not exceeding the maximum amount permitted by law at the time of the request therefor.

### B. IT IS MUTUALLY AGREED THAT:

(1) Any award of damages in connection with any condemnation for public use of or injury to said property or any part thereof is hereby assigned and shall be paid to Beneficiary who may apply or release such moneys received in the same manner and with the same effect as above provided for disposition of proceeds of fire or other insurance.

(2) By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive the right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.

(3) At any time or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed and said note for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby, Trustee may: reconvey all or any part of said property; consent to the making of any map or plat thereof; join in granting any easement hereon; or join in and extension agreement or any agreement subordinating the lien or charge hereof.

(4) Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed and said note to Trustee for cancellation and retention and upon payment of its fees, Trustee shall reconvey, without warranty, the property then held hereunder. The recitals in any reconveyance executed under this Deed of Trust of any matter or facts shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons legally entitled thereto."

(5) Upon default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of his election to cause to be sold the herein described property to satisfy the obligations hereof, and shall cause such notice to be recorded in the office of the recorder of each county wherein said real estate property or some part thereof is situated.

Notice of sale having been given as then required by law, and not less than the time then required by law having elapsed, Trustee, without demand on Grantor, shall sell said property at the time and place fixed by it in said notice of sale, either as a whole or in separate parcels and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee shall deliver to the purchaser its deed conveying the property so sold but without any covenant or warranty express or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Grantor, Trustee, or Beneficiary, may purchase at such a sale. The bid by the holder of this note upon the credit of the money obligation secured hereby shall be reduced in an amount equivalent to the then unpaid principal balance of the included notes.

After deducting all costs, fees and expenses of Trustee and of the this Trust, including cost of evidence of title and reasonable counsel fees in connection with sale, Trustee shall apply the proceeds of sale to payment of all sums expended under the terms hereof, not then repaid, with accrued interest at the highest lawful rate permissible under Idaho law; all other sums then secured hereby; and the remainder, if any, to the person or persons legally entitled thereto.

(6) This deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. The term Beneficiary shall mean the holder and owner of the note secured hereby; or, if the note has been pledged, the pledgee thereof.

(7) Trustee accepts this Trust when this Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Grantor, Beneficiary or Trustee shall be a party unless brought by

(9) In the event of dissolution or resignation of the Trustee, the Beneficiary may substitute a trustee or trustees to execute the trust hereby created, and when any such substitution has been filed for record in the office of the county recorder, it shall be conclusive evidence of the appointment of such trustee or trustees, and such new trustee or trustees shall succeed to all of the powers and duties of the trustee or trustees named herein.

(THIS DEED OF TRUST FOR USE ONLY IN PURCHASE MONEY TRANSACTIONS, IT IS RECOMMENDED THAT, PRIOR TO THE EXECUTION OF THIS DEED OF TRUST, THE PARTIES CONSULT WITH THEIR ATTORNEYS WITH RESPECT TO SAME.)

Krystal M. Barrett

STATE OF IDAHO, County of Bonneville

—THIS SPACE FOR RECORDER'S USE ONLY—

On this 13 day of December, 2005, before me, THE UNDERSIGNED, Notary Public in and for said State personally appeared Krystal M. Barrett

Known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Notary Public for Idaho

Residing At:

Comm Expires:

NOTARY PUBLIC  
NOLAN C. LEE  
STATE OF IDAHO

DO NOT RECORD THE MATTERS BELOW THIS LINE

FOR RECONVEYANCE OR FORECLOSURE SEND TO THE NEAREST OFFICE OF IDAHO TITLE AND TRUST

**REQUEST FOR FULL RECONVEYANCE**

To be used only when note has been paid

Dated:

**TO IDAHO TITLE AND TRUST, TRUSTEE:**

The undersigned is the legal owner and holder of all indebtedness secured by the within Deed of Trust. All sums secured by said Deed of Trust have been fully paid and satisfied; and you are hereby requested and directed on payment to you of any sums owing to you under the terms of said Deed of Trust, to cancel all evidence of indebtedness, secured by said Deed of Trust, delivered to you herewith together with the said Deed of Trust, and to reconvey, without warranty, to the parties designated by the terms of said Deed of Trust, the estate now held by you under the same.

**MAIL RECONVEYANCE TO:**

(By) \_\_\_\_\_

(By) \_\_\_\_\_

Do not lose or destroy this Deed of Trust OR THE NOTE which it secures. Both must be delivered to the Trustee for cancellation before reconveyance will be made.

ALL-INCLUSIVE  
DEED OF TRUST  
WITH POWER OF SALE

IDAHO TITLE AND TRUST

P.O. Box 50367  
Idaho Falls, Idaho 83404

EXHIBIT "A"

PARCEL 1: Lot 15, Block 6, Buffalo River Estates Division No. 2, Fremont County, Idaho, as per the recorded plat thereof.

PARCEL 2:

A parcel of land in the NE¼ of Section 23, Township 13 North, Range 43, East of the Boise Meridian, lying South of and adjacent to the South lines of Buffalo River Estates, Division #2, Fremont County, Idaho, described as follows:

Beginning at the Southeast corner of Lot 15, Block 6 of Buffalo River Estates, Division #2;

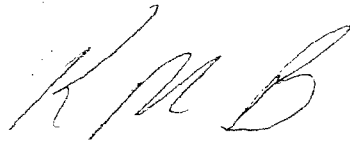
Thence South  $89^{\circ} 44' 48''$  West, 100.58 feet to the Southwest corner of said Lot 15;

Thence South  $0^{\circ} 15' 12''$  East, 118.39 feet to a point of curve with a radius of 30.00 feet;

Thence to the left along said curve 47.24 feet through a central angle of  $90^{\circ} 13' 42''$ ;

Thence North  $89^{\circ} 44' 48''$  East, 71.05 feet;

Thence North  $0^{\circ} 15' 12''$  West, 148.51 feet TO THE POINT OF BEGINNING.



# EXHIBIT C

KRYSTAL M. BARNETT, KELLY N. CLAY  
895 EAST 11TH STREET  
IDAHO FALLS, ID 83401

THE BANK OF COMMERCIAL NORTHGATE  
1020 NORTHGATE MILE  
IDAHO FALLS, ID 83401

Loan Number 4001853289  
Date 12-07-2005  
Maturity Date 12-25-2010  
Loan Amount \$ 20,477.00  
Renewal Of \_\_\_\_\_

**BORROWER'S NAME AND ADDRESS**

"You" includes each borrower above, jointly and severally.

**LENDER'S NAME AND ADDRESS**

"You" means the lender, its successors and assigns

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of TWENTY THOUSAND FOUR HUNDRED SEVENTY SEVEN AND NO/100 Dollars \$ 20,477.00

☒ Single Advance: I will receive all of this principal sum on 12-07-2005. No additional advances are contemplated under this note.

☐ Multiple Advance: The principal sum shown above is the maximum amount of principal I can borrow under this note. On \_\_\_\_\_ I will receive the amount of \$ \_\_\_\_\_ and future principal advances are contemplated.

Conditions: The conditions for future advances are \_\_\_\_\_

☐ Open End Credit: You and I agree that I may borrow up to the maximum principal sum more than one time. This feature is subject to all other conditions and expires on \_\_\_\_\_

☐ Closed End Credit: You and I agree that I may borrow (subject to all other conditions) up to the maximum principal sum only one time.

INTEREST: I agree to pay interest on the outstanding principal balance from 12-07-2005 at the rate of 9.50% per year until 12-07-2006.

☒ Variable Rate: This rate may then change as stated below.

☒ Index Rate: The future rate will be 2.500 PERCENT ABOVE the following index rate: HIGHEST PUBLISHED WALL STREET JOURNAL PRIME RATE SEE "LIMITATIONS" BELOW

THE RESULT OF THIS CALCULATION WILL BE ROUNDED TO THE NEAREST 0.001

☐ No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.

☒ Frequency and Timing: The rate on this note may change as often as EVERY YEAR BEGINNING 12-07-2006. A change in the interest rate will take effect ON THE SAME DAY.

☒ Limitations: During the term of this loan, the applicable annual interest rate will not be more than 18.000% or less than 7.000%. The rate may not change more than \_\_\_\_\_ % each \_\_\_\_\_.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☒ The amount of the final payment will change.

☐ \_\_\_\_\_

ACCUAL METHOD: Interest will be calculated on a ACTUAL/365 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☒ on the same fixed or variable rate basis in effect before maturity (as indicated above)

☐ at a rate equal to \_\_\_\_\_

☒ LATE CHARGE: If a payment is made more than 15 days after it is due, I agree to pay a late charge of 5.000% OF THE DUE AMOUNT WITH A MIN OF \$5.00.

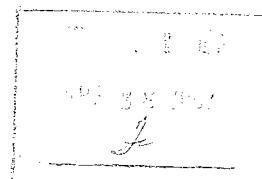
☒ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☒ are ☐ are not included in the principal amount above: OFFICIALS \$27.00; FLOOD CERTIFICATION \$15.00; TITLE POLICY \$65.00; APPRAISAL \$100.00; LOAN DOC FEE \$250.00

PAYMENTS: I agree to pay this note as follows:

60 MONTHLY PAYMENTS OF \$270.25 BEGINNING 01-25-2006 AND 1 BALLOON PAYMENT OF \$12,640.39 ON 12-25-2010. THIS IS A VARIABLE RATE LOAN AND THE FINAL PAYMENT AMOUNT MAY CHANGE.

PURPOSE: The purpose of this loan is CONSUMER USE BUT CONSOLIDATION

ADDITIONAL TERMS: \_\_\_\_\_



*[Handwritten signature]*

pages 2 or 3)



request, a written list of the buyers, commission merchants or selling agents to or through whom I may sell my farm products. In addition to those parties named on the list, I authorize you to notify at your sole discretion any other parties regarding your security interest in my farm products. I am subject to all applicable penalties for selling my farm products in violation of my agreement with you and the Food Security Act. In this paragraph the terms farm products, buyers, commission merchants and selling agents have the meanings given to them in the Federal Food Security Act of 1985.

If this agreement covers chattel paper or instruments, either as original collateral or proceeds of the Property, I will note your interest on the face of the chattel paper or instruments.

**REMEDIES** - I will be in default on this security agreement if I am in default on any note this agreement secures or if I fail to keep any promise contained in the terms of this agreement. If I default, you have all of the rights and remedies provided in the note and under the Uniform Commercial Code. You may require me to make the secured property available to you at a place which is reasonably convenient. You may take possession of the secured property and sell it as provided by law. The proceeds will be applied first to your expenses and then to the debt. I agree that 10 days written notice sent to my last known address by first class mail will be reasonable notice under the Uniform Commercial Code. My current address is on page 1.

**PERFORMANCE OF SECURITY INTEREST** - I authorize you to file a financing statement covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining possession of or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code.

#### ADDITIONAL TERMS OF THE NOTE

**DEFINITIONS** - As used on pages 1 and 2, "I" means the terms that apply to this loan. "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, endorser, and sureties) who agrees to pay this note (together referred to as "us"). "You" or "your" means the Lender and its successors and assigns.

**APPLICABLE LAW** - The law of the state of Idaho will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

**PAYMENTS** - Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless, when I make the prepayment, you and I agree in writing to the contrary).

**INTEREST** - Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal sum outstanding at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to in this note (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

**INDEX RATE** - The index will serve only as a device for setting the interest rate on this note. You do not guarantee by selecting this index, or the margin, that the interest rate on this note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers.

**POST MATURITY RATE** - For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

**SINGLE ADVANCE LOANS** - If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph on page 2.


**MULTIPLE ADVANCE LOANS** - If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

**SET-OFF** - I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

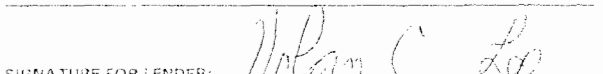
"Right to receive money from you" means:

- (1) any deposit account balance I have with you;
- (2) any money owed to me on an item presented to you or in your possession for collection or exchange; and
- (3) any repurchase agreement or other nondeposit obligation.

**SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGES 1 AND 2). I have received a copy on today's date.**

  
KRISTAL M. BARRETT

  
KELLY N. CLAY

  
NOLAN C. LEE, VICE PRESIDENT

**ACKNOWLEDGMENT: STATE OF IDAHO.** \_\_\_\_\_ County ss: \_\_\_\_\_  
On this \_\_\_\_\_ day of \_\_\_\_\_, before me \_\_\_\_\_, a Notary Public in and for said county and state, personally appeared \_\_\_\_\_, known or identified to me, or proved on the oath of \_\_\_\_\_, to be the person(s) who executed this instrument and acknowledged to me that \_\_\_\_\_ executed the same.  
I set my hand and affixed my seal the day and year first above written.

Notary Public residing at: \_\_\_\_\_

could be notarized when a secured interest is taken in a motor vehicle.)

3046524467 D+E  
ALLIANCE TITLE & ESCROW  
P.O. BOX 732  
REXBURG, ID 83440

Microfilm No. 499843  
At 13 Day 20 05  
15:48 O'Clock P.M.  
ABBIE MACE  
FREMONT CO RECORDER  
Fee \$ 15 Deputy  
Recorded at Request of  
ALLIANCE TITLE & ESCROW

State of Idaho Space Above This Line For Recording Data

**DEED OF TRUST**  
(With Future Advance Clause)

1. **DATE AND PARTIES.** The date of this Deed of Trust (Security Instrument) is 12-07-2005  
and the parties, their addresses and tax identification numbers, if required, are as follows:

GRANTOR: KRYSTAL M. BARRETT, AS SOLE AND SEPARATE PROPERTY  
KELLY M. CLAY  
895 EAST 11TH STREET  
IDAHO FALLS, ID 83404

☐ If checked, refer to the attached Addendum incorporated herein, for additional Grantors, their signatures and acknowledgments.

TRUSTEE: ALLIANCE TITLE & ESCROW  
451 PARK AVE.  
IDAHO FALLS, ID 83402

LENDER: THE BANK OF COMMERCE NORTHGATE  
1020 NORTHGATE MILE  
IDAHO FALLS, ID 83401

2. **CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (defined below) and Grantor's performance under this Security Instrument, Grantor irrevocably grants, bargains, sells and conveys to Trustee, in trust for the benefit of Lender, with power of sale, the following described property: SEE EXHIBIT 'A' WHICH IS ATTACHED HERETO AND MADE A PART HEREOF.

The property is located in FREMONT at 4058 STEELHEAD DRIVE  
(County)  
ISLAND PARK, Idaho 83421  
(Address) (City) (ZIP Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, ditches, and water stock and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

3. **MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Security Instrument at any one time shall not exceed \$ 20,477.00. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.
4. **SECURED DEBT AND FUTURE ADVANCES.** The term "Secured Debt" is defined as follows:  
A. Debt incurred under the terms of all promissory note(s), contract(s), guaranty(s) or other evidence of debt described below and all their extensions, renewals, modifications or substitutions. (When referencing the debts below it is suggested that you include items such as borrowers' names, note amounts, interest rates, maturity dates, etc.)  
NOTE DATED 12/07/2005 IN THE AMOUNT OF \$20,477.00, TO MATURE ON 12/25/2010

- B. All future advances from Lender to Grantor or other future obligations of Grantor to Lender under any promissory note, contract, guaranty, or other evidence of debt executed by Grantor in favor of Lender after this Security Instrument whether or not this Security Instrument is specifically referenced. If more than one person signs this Security Instrument, each Grantor agrees that this Security Instrument will secure all future advances and future obligations that are given to or incurred by any one or more Grantor, or any one or more Grantor and others. All future advances and other future obligations are secured by this Security Instrument even though all or part may not yet be advanced. All future advances and other future obligations are secured as if made on the date of this Security Instrument. Nothing in this Security Instrument shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment must be agreed to in a separate writing.
- C. All obligations Grantor owes to Lender, which may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.
- D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Security Instrument.
- This Security Instrument will not secure any other debt if Lender fails to give any required notice of the right of rescission.
5. **PAYMENTS.** Grantor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument. If any note evidencing the Secured Debt contains a variable rate feature, Grantor acknowledges that the interest rate, payment terms, or balance due on the loan may be indexed, adjusted, renewed or renegotiated.
  6. **WARRANTY OF TITLE.** Grantor warrants that Grantor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to irrevocably grant, bargain, sell and convey the Property to Trustee, in trust, with power of sale. Grantor also warrants that the Property is unencumbered, except for encumbrances of record.
  7. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Grantor agrees:
    - A. To make all payments when due and to perform or comply with all covenants.
    - B. To promptly deliver to Lender any notices that Grantor receives from the holder.
    - C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.
  8. **CLAIMS AGAINST TITLE.** Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Grantor may have against parties who supply labor or materials to maintain or improve the Property.
  9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Security Instrument is released.
  10. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor shall not commit or allow any waste, impairment, or deterioration of the Property. Grantor will keep the Property free of noxious weeds and grasses. Grantor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Grantor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor, and of any loss or damage to the Property. Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender shall give Grantor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property shall be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.
  11. **AUTHORITY TO PERFORM.** If Grantor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. Lender's right to perform for Grantor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.
  12. **ASSIGNMENT OF LEASES AND RENTS.** Grantor absolutely, unconditionally, irrevocably and immediately assigns, grants, bargains and conveys to Trustee, in trust for the benefit of Lender all the right, title and interest in the following (all referred to as Property): existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including any extensions, renewals, modifications or replacements (all referred to as Leases); and rents, issues and profits (all referred to as Rents). In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement. Grantor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Lender grants Grantor a revocable license to collect, receive, enjoy and use the Rents as long as Grantor is not in default. Grantor's default automatically and immediately revokes this license. Upon default, Grantor will receive any Rents in trust for Lender and Grantor will not commingle the Rents with any other funds. When Lender so directs, Grantor will endorse and deliver any payments of Rents from the Property to Lender. Grantor agrees that Lender will not be considered to be a mortgagee-in-possession by executing this Security Instrument or by collecting or receiving payments on the Secured Debts, but only may become a mortgagee-in-possession after Grantor's license to collect, receive, enjoy and use the Rents is revoked by Lender or automatically revoked on Grantor's default, and Lender takes actual possession of the Property. Consequently, until Lender takes actual possession of the Property, Lender is not obligated to perform or discharge any obligation of Grantor under the Leases, appear in or defend any action or proceeding relating to the Rents, the Leases or the Property, or be liable in any way for any injury or damage to any person or property sustained in or about the Property. Grantor agrees that this Security Instrument is immediately effective between Grantor and Lender and effective as to third parties on the recording of this Assignment. As long as this Assignment is in effect, Grantor warrants and represents that no default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants.
  13. **LEASEHOLDS; CONDOMINIUMS; PLANNED UNIT DEVELOPMENTS.** Grantor agrees to comply with the provisions of any lease if this Security Instrument is on a leasehold. If the Property includes a unit in a condominium or a planned unit development, Grantor will perform all of Grantor's duties under the covenants, by laws, or regulations of the condominium or planned unit development, or will be in default if any party obligated on the Secured Debt fails to make payment when due, or is in default if the prospect of payment, performance, or realization of collateral is significantly impaired.

15. **REMEDIES ON DEFAULT.** In some instances, federal and state law will require Lender to provide Grantor with notice of the right to cure or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Grantor is in default.
- At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the terms of the Secured Debt, this Security Instrument and any related documents, including without limitation, the power to sell the Property.
- If there is a default, Trustee shall, in addition to any other permitted remedy, at the request of the Lender, advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder for cash and convey absolute title free and clear of all right, title and interest of Grantor at such time and place as Trustee designates. Trustee shall give notice of sale including the time, terms and place of sale and a description of the property to be sold as required by the applicable law in effect at the time of the proposed sale.
- Upon sale of the property and to the extent not prohibited by law, Trustee shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser, and after first paying all fees, charges and costs, shall pay to Lender all moneys advanced for repairs, taxes, insurance, liens, assessments and prior encumbrances and interest thereon, and the principal and interest on the Secured Debt, paying the surplus, if any, to Grantor. Lender may purchase the Property. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein.
- All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require complete cure of any existing default. By not exercising any remedy on Grantor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.
16. **EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Grantor agrees to pay all of Lender's expenses if Grantor breaches any covenant in this Security Instrument. Grantor will also pay on demand any amount incurred by Lender for insuring, inspecting, preserving or otherwise protecting the Property and Lender's security interest. These expenses will bear interest from the date of the payment until paid in full at the highest interest rate in effect as provided in the terms of the Secured Debt. Grantor agrees to pay all costs and expenses incurred by Lender in collecting, enforcing or protecting Lender's rights and remedies under this Security Instrument. This amount may include, but is not limited to, attorneys' fees, court costs, and other legal expenses. This amount does not include attorneys' fees for a salaried employee of the Lender. This Security Instrument shall remain in effect until released. Grantor agrees to pay for any recordation costs of such release.
17. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), and all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law.
- Grantor represents, warrants and agrees that:
- A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance is or will be located, stored or released on or in the Property. This restriction does not apply to small quantities of Hazardous Substances that are generally recognized to be appropriate for the normal use and maintenance of the Property.
  - B. Except as previously disclosed and acknowledged in writing to Lender, Grantor and every tenant have been, are and shall remain in full compliance with any applicable Environmental Law.
  - C. Grantor shall immediately notify Lender if a release or threatened release of a Hazardous Substance occurs on, under or about the Property or there is a violation of any Environmental Law concerning the Property. In such an event, Grantor shall take all necessary remedial action in accordance with any Environmental Law.
  - D. Grantor shall immediately notify Lender in writing as soon as Grantor has reason to believe there is any pending or threatened investigation, claim, or proceeding relating to the release or threatened release of any Hazardous Substance or the violation of any Environmental Law.
18. **CONDEMNATION.** Grantor will give Lender prompt notice of any pending or threatened action, by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.
19. **INSURANCE.** Grantor shall keep Property insured against loss by fire, flood, theft and other hazards and risks reasonably associated with the Property due to its type and location. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding sentence can change during the term of the loan. The insurance carrier providing the insurance shall be chosen by Grantor subject to Lender's approval, which shall not be unreasonably withheld. If Grantor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Security Instrument.
- All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "loss payee clause." Grantor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Grantor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Grantor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Grantor.
- Unless otherwise agreed in writing, all insurance proceeds shall be applied to the restoration or repair of the Property or to the Secured Debt, whether or not then due, at Lender's option. Any application of proceeds to principal shall not extend or postpone the due date of the scheduled payment nor change the amount of any payment. Any excess will be paid to the Grantor. If the Property is acquired by Lender, Grantor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.
20. **ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.
21. **FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Grantor will provide to Lender upon request, any financial statement or information Lender may deem reasonably necessary. Grantor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Security Instrument and Lender's lien status on the Property.
22. **JOINT AND SEVERAL INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Security Instrument are joint and individual. If Grantor signs this Security Instrument but does not sign an evidence of so only to mortgage Grantor's interest in the Property to secure payment of the Secured Debt and

Grantor does not agree to be personally liable on the Secured Debt. If this Security Instrument secures a guaranty between Lender and Grantor, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. Grantor agrees that Lender and any party to this Security Instrument may extend, modify or make any change in the terms of this Security Instrument or any evidence of debt without Grantor's consent. Such a change will not release Grantor from the terms of this Security Instrument. The duties and benefits of this Security Instrument shall bind and benefit the successors and assigns of Grantor and Lender.

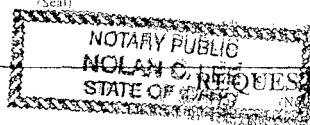
23. **APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Security Instrument is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Security Instrument is complete and fully integrated. This Security Instrument may not be amended or modified by oral agreement. Any section in this Security Instrument, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section of this Security Instrument cannot be enforced according to its terms, that section will be severed and will not affect the enforceability of the remainder of this Security Instrument. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Security Instrument are for convenience only and are not to be used to interpret or define the terms of this Security Instrument. Time is of the essence in this Security Instrument.
24. **SUCCESSOR TRUSTEE.** Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee without any other formality than the designation in writing. The successor trustee, without conveyance of the Property, shall succeed to all the title, power and duties conferred upon Trustee by this Security Instrument and applicable law.
25. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing. Notice to one grantor will be deemed to be notice to all grantors.
26. **WAIVERS.** Except to the extent prohibited by law, Grantor waives all rights to homestead exemption, appraisal and the marshalling of liens and assets relating to the Property.
27. **DECLARATION.** Grantor declares that the Property is either not more than forty acres in area or that the Property is located within an incorporated city or village.
28. **OTHER TERMS.** If checked, the following are applicable to this Security Instrument:
- ☐ **Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Security Instrument will remain in effect until released.
  - ☐ **Construction Loan.** This Security Instrument secures an obligation incurred for the construction of an improvement on the Property.
  - ☐ **Fixture Filing.** Grantor grants to Lender a security interest in all goods that Grantor owns now or in the future and that are or will become fixtures related to the Property. This Security Instrument suffices as a financing statement and any carbon, photographic or other reproduction may be filed of record for purposes of Article 9 of the Uniform Commercial Code.
  - ☐ **Riders.** The covenants and agreements of each of the riders checked below are incorporated into and supplement and amend the terms of this Security Instrument. [Check all applicable boxes]
    - ☐ Condominium Rider ☐ Planned Unit Development Rider ☐ Other .....
  - ☐ **Additional Terms.**

**SIGNATURES:** By signing below, Grantor agrees to the terms and covenants contained in this Security Instrument and in any attachments. Grantor also acknowledges receipt of a copy of this Security Instrument on the date stated on page 1.

*Krystal M. Barrett* 12-13-05 *Kelly Clay* 12-13-05  
 (Signature) KRYSTAL M. BARRETT (Date) (Signature) KELLY N. CLAY (Date)

**ACKNOWLEDGMENT:**

STATE OF IDAHO ..... COUNTY OF ..... } ss.  
 On this 7TH ..... day of DECEMBER, 2005, before me, a Notary Public, personally appeared KRYSTAL M. BARRETT, AS SOLE AND SEPARATE PROPERTY, AND KELLY N. CLAY, known or identified to me (or proved to me on the oath of .....), to be the person(s) whose name is subscribed to the within instrument, and acknowledged to me that she/he/they executed the same.  
 My commission expires: 11-21-2007



*Nolan C. Reese*  
 Residing at: Idaho Falls  
 (Notary Public)

**TO TRUSTEE:**

The undersigned is the holder of the note or notes secured by this Deed of Trust. Said note or notes, together with all other indebtedness secured by this Deed of Trust, have been paid in full. You are hereby directed to cancel this Deed of Trust, which is delivered hereby, and to reconvey, without warranty, all the estate now held by you under this Deed of Trust to the person or persons legally entitled thereto.

## EXHIBIT "A"

PARCEL 1: Lot 15, Block 6, Buffalo River Estates Division No. 2, Fremont County, Idaho, as per the recorded plat thereof.

## PARCEL 2:

A parcel of land in the NE¼ of Section 23, Township 13 North, Range 43, East of the Boise Meridian, lying South of and adjacent to the South lines of Buffalo River Estates, Division #2, Fremont County, Idaho, described as follows:

Beginning at the Southeast corner of Lot 15, Block 6 of Buffalo River Estates, Division #2;

Thence South  $89^{\circ}44'48''$  West, 100.58 feet to the Southwest corner of said Lot 15;

Thence South  $0^{\circ}15'12''$  East, 118.39 feet to a point of curve with a radius of 30.00 feet;

Thence to the left along said curve 47.24 feet through a central angle of  $90^{\circ}13'42''$ ;

Thence North  $89^{\circ}44'48''$  East, 71.05 feet;

Thence North  $0^{\circ}15'12''$  West, 148.51 feet TO THE POINT OF BEGINNING.

KMB  
KNC

THE BANK OF COMMERCE NORTHGATE  
1020 NORTHGATE MALL  
IDAHO FALLS, ID 83404

KRYSTAL M. BARRETT; KELLY N. CLAY  
895 EAST 11TH STREET  
IDAHO FALLS, ID 83404

Application Received 11-30-2005  
Date of Disclosure 11-30-2005  
Assumed Date of Closing 12-07-2005  
Date of Delivery 11-30-2005

LENDER'S NAME AND ADDRESS

APPLICANT'S NAME AND CURRENT ADDRESS

By ☐ Mail ☒ in Person

TRUTH-IN-LENDING DISCLOSURES  
"YOU" MEANS THE BORROWER AND "I" MEANS THE LENDER

You have submitted a written application for a federally related mortgage loan to be secured by real estate located at 4058 STEELHEAD DRIVE, ISLAND PARK, ID 83421

Pursuant to law, we are providing you with an estimate of the costs and terms of this proposed credit under the Truth-in-Lending Act. These disclosures are not an approval of your application for credit and do not constitute an agreement to lend you the money you request on the terms stated on this form. We may still deny your application entirely, or offer you credit on terms different from those stated on this form.

| ANNUAL PERCENTAGE RATE<br>The cost of your credit as a yearly rate. | FINANCE CHARGE<br>The dollar amount the credit will cost you. | AMOUNT FINANCED<br>The (proposed) amount of credit provided to you or on your behalf. | TOTAL OF PAYMENTS<br>The amount you will have paid when you have made all scheduled payments. |
|---|---|---|---|
| 9.889 %   | \$ 8,373.14   | \$ 20,212.00  | \$ 28,585.14  |

Your Payment Schedule will be:

| Number of Payments | Amount of Payments | When Payments Will Be Due    |
|--------------------|--------------------|------------------------------|
| 59                 | \$ 270.25          | MONTHLY BEGINNING 01-25-2006 |
| 1                  | \$ 12,640.39       | ON 12-25-2010                |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |

☐ Demand: ☐ This loan will have a demand feature. ☐ This loan will be payable on demand and all disclosures are based on an assumed maturity of one year.

☒ Variable Rate: (check one below)

☐ Your loan contains a variable rate feature. Disclosures about the variable rate feature have been provided to you earlier.

☒ The annual percentage rate may increase during the term of this transaction if HIGHEST PUBLISHED WALL STREET JOURNAL PRIME RATE SEE

"LIMITATIONS" BELOW

INCREASES. THE RESULT OF THIS CALCULATION WILL BE ROUNDED TO THE NEAREST 0.001

ANY INCREASE WILL TAKE THE FORM OF AN INCREASE IN THE AMOUNT DUE AT MATURITY. IF THE RATE INCREASES BY 1.000% ON 12-07-2006, THE AMOUNT DUE AT MATURITY WILL INCREASE TO \$13,462.64. THE RATE WILL NOT INCREASE MORE OFTEN THAN ONCE EVERY 1 YEAR. THE RATE WILL NOT GO ABOVE 18.000%.

Security: You will be giving a security interest in:

☒ (brief description of other property)

Filing Fees: \$ 15.00

☐ the goods or property being purchased.

☐ collateral securing other loans with us may also secure this loan.

☒ your deposit accounts and other rights you may have to the payment of money from us.

DEED OF TRUST DATED 12/07/2005 AND 1958 SCHU HS TL  
MOBILE HOME VIN - V-56660

☒ Late Charge: If a payment is late you will be charged 5.000% OF THE LATE AMOUNT WITH A MIN OF \$5.00 IF MORE THAN 15 DAYS LATE

☒ Required Deposit: The annual percentage rate does not take into account your required deposit.

Prepayment: if you pay off this loan early, you ☐ may ☒ will not have to pay penalty.

☐ may ☒ will not be entitled to a refund of part of the finance charge.

Assumption: Someone buying your house ☐ may, subject to conditions, be allowed to ☒ cannot assume the remainder of the mortgage on the original terms.

All numerical disclosures are estimates (except

You can see your contract documents for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds and penalties

INSURANCE - Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless you sign (a separate form) and agree to pay the additional costs. The cost of credit insurance on the loan disclosed above is:

| Type              | Premium | Term |
|-------------------|---------|------|
| Credit Life       |         |      |
| Credit Disability |         |      |

PROPERTY INSURANCE - You may obtain property insurance from anyone you want that is acceptable to us, if you get the insurance from or through us you will pay

\$ \_\_\_\_\_ for \_\_\_\_\_ of coverage.\*

FLOOD INSURANCE: Flood insurance ☐ is ☒ is not required. ☐ A flood determination has not yet been made. You may obtain required flood insurance from anyone you want that is acceptable to us. If you get the insurance from or through us you will pay

\$ \_\_\_\_\_ for \_\_\_\_\_ of coverage.\*

\* Assumes property has insurable value of \$ \_\_\_\_\_

BY SIGNING BELOW - APPLICANT(S) ACKNOWLEDGE RECEIPT OF A COPY OF THIS DISCLOSURE ON THE DATE OF DELIVERY INDICATED ABOVE.

X Krystal M. Barrett  
KRYSTAL M. BARRETT

X Kelly N. Clay  
KELLY N. CLAY

©1992 Bankers Systems, Inc., St. Cloud, MN (1-800-397-2341) Form TL-EARLY 3/29/94

Page 1 of 11

THE BANK OF COMMERCIAL NORTHGATE  
1020 NORTHGATE MILE  
IDAHO FALLS, ID 83404

KRYSTAL M. BARRETT; KELLY N. CLAY  
895 EAST 11TH STREET  
IDAHO FALLS, ID 83404

Loan Number **4001852289**  
Date **12-07-2005**  
Mat. Date **12-25-2010**  
Loan Amount **\$20,477.00**

LENDER'S NAME AND ADDRESS

BORROWER'S NAME AND ADDRESS

TRUTH-IN-LENDING DISCLOSURES

| ANNUAL PERCENTAGE RATE<br>The cost of my credit as a yearly rate. | FINANCE CHARGE<br>The dollar amount the credit will cost me. | AMOUNT FINANCED<br>The amount of credit provided to me or on my behalf. | TOTAL OF PAYMENTS<br>The amount I will have paid when I have made all scheduled payments. | I have the right to receive at this time an itemization of the Amount Financed<br><br>do do not want an itemization. |
|---|--|---|---|--|
| 9.889%  | \$ 8,373.14  | \$ 20,212.00  | \$ 29,585.14  |  |

My Payment Schedule will be:

| Number of Payments | Amount of Payments | When Payments Are Due        |
|--------------------|--------------------|------------------------------|
| 59                 | \$ 270.25          | MONTHLY BEGINNING 01-25-2006 |
| 1                  | \$ 12,540.39       | ON 12-25-2010                |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |
|                    | \$                 |                              |

- ☐ Demand: ☐ This loan has a demand feature. ☐ This loan is payable on demand and all disclosures are based on an assumed maturity of one year.
- ☒ Variable Rate (Check one) ☐ My loan contains a variable rate feature. Disclosures about the variable rate feature have been provided to me earlier.
- ☒ The annual percentage rate may increase during the term of this transaction if HIGHEST PUBLISHED WALL STREET JOURNAL

PRIME RATE SEE "LIMITATIONS" BELOW

INCREASES. THE RESULT OF THIS CALCULATION WILL BE ROUNDED TO THE NEAREST 0.001

ANY INCREASE WILL TAKE THE FORM OF AN INCREASE IN THE AMOUNT DUE AT MATURITY. IF THE RATE INCREASES BY 1.000% ON 12-07-2006, THE AMOUNT DUE AT MATURITY WILL INCREASE TO \$13,462.64. THE RATE WILL NOT INCREASE MORE OFTEN THAN ONCE EVERY 1 YEAR. THE RATE WILL NOT GO ABOVE 18.000%.

- ☒ Security: I am giving a security interest in: ☒ (brief description of other property) Filing/Recording Fees: \$ 15.00
- ☐ the goods or property being purchased.
- ☐ collateral securing other loans with you may also secure this loan.
- DEED OF TRUST DATED 12/07/2005 AND 1958 SCHU HS TL
- ☒ my deposit accounts and other rights I may have to the payment of money from you. MOBILE HOME VIN - V-56660
- ☒ Late Charge: If a payment is late I will be charged 5.000% OF THE LATE AMOUNT WITH A MIN OF \$5.00 IF MORE THAN 15 DAYS LATE
- ☒ Required Deposit: The annual percentage rate does not take into account my required deposit.
- Prepayment: If I pay off this loan early, I ☒ may ☐ will not have to pay a penalty.
- ☐ may ☒ will not be entitled to a refund of part of the finance charge.
- ☒ Assumption: Someone buying my house ☐ may, subject to conditions, be allowed to ☒ cannot assume the remainder of the mortgage on the original terms.

I can see my contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties. "e" means an estimate.

CREDIT INSURANCE - Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless I sign and agree to pay the additional costs.

| Type              | Premium | Term |
|-------------------|---------|------|
| Credit Life       |         |      |
| Credit Disability |         |      |

I ☐ do ☒ do not want credit life insurance

X Kelly N. Clay DOB

I ☐ do ☐ do not want credit disability insurance.

X Kristal M. Barrett DOB

I ☐ do ☐ do not want joint credit life insurance.

X DOB

X DOB

I ☐ do ☐ do not want \_\_\_\_\_ insurance.

X #

PROPERTY INSURANCE - I may obtain property insurance from anyone I want that is acceptable to you, if I get the insurance from or through you

I will pay \$ \_\_\_\_\_ for \_\_\_\_\_ of coverage

FLOOD INSURANCE - Flood insurance ☐ is ☒ is not required I may obtain flood insurance from anyone I want that is acceptable to you, if I get the insurance from or through you I will pay

\_\_\_\_\_ for \_\_\_\_\_ of coverage.

ITEMIZATION OF AMOUNT FINANCED

Amount given to me directly \$ 20,000.00

Amount paid on my (loan) account \$

\$

AMOUNTS PAID TO OTHERS ON MY BEHALF:

Insurance Companies \$

Public Officials \$ 15.00

\$ 100.00

\$ 15.00

\$ 250.00

\$ 85.00

\$ 12.00

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

\$

(less) PREPAID FINANCE CHARGE(S) \$ 285.00

Amount Financed \$ 20,212.00

(Add all items financed and subtract prepaid finance charges)

\*You may retain or receive a portion of these amounts

ACKNOWLEDGE RECEIPT OF A COPY OF THIS DISCLOSURE ON THE DATE INDICATED ABOVE

Kelly N. Clay  
KELLY N. CLAY



|   |  |   |  |
|---|--|---|--|
| Name & Address of Borrower: <b>KRYSTAL M. BARRETT; KELLY N. CLAY</b><br>895 EAST 11TH STREET<br>IDAHO FALLS, ID 83404 |  | Name & Address of Lender: <b>THE BANK OF COMMERCE-NORTHGATE</b><br>1020 NORTHGATE MILE<br>IDAHO FALLS, ID 83401                   |  |
| Property Location (if different from above):<br>4058 STEELHEAD DRIVE, ISLAND PARK, ID 83421                           |  | Settlement Agent: <b>ALLIANCE TITLE AND ESCROW</b><br>Place of Settlement:  |  |
| Loan Number:  |  | Settlement Date: <b>12-07-2005</b>  |  |
| <b>L. SETTLEMENT CHARGES</b>  |  | <b>M. DISBURSEMENT TO OTHERS</b>  |  |
| 800. Items Payable in Connection With Loan  |  | 1501.   |  |
| 801. Loan origination fee % to  |  |   |  |
| 802. Loan discount % to   |  |   |  |
| 803. Appraisal fee to <b>100.00</b>   |  | 1502.   |  |
| 804. Credit report to   |  |   |  |
| 805. Inspection fee to  |  |   |  |
| 806. Mortgage insurance application fee to  |  | 1503.   |  |
| 807. Mortgage broker fee to   |  |   |  |
| 808.  |  |   |  |
| 809. FLOOD MONITORING <b>15.00</b>  |  | 1504.   |  |
| 810.  |  |   |  |
| 811.  |  |   |  |
| <b>900. Items Required By Lender To Be Paid In Advance</b>  |  | 1505.   |  |
| 901. Interest from to @ \$ day  |  |   |  |
| 902. Mortgage insurance premium for pymt. periods to  |  | 1506.   |  |
| 903. Hazard insurance premium for years to  |  |   |  |
| 904. CREDIT INS. PREM. years to   |  | 1507.   |  |
| 905.  |  |   |  |
| 906.  |  | 1508.   |  |
| <b>1000. Reserves Deposited With Lender</b>   |  |   |  |
| 1001. Hazard insurance pymt. periods @ \$ per period  |  |   |  |
| 1002. Mortgage insurance pymt. periods @ \$ per period  |  | 1509.   |  |
| 1003. City property taxes pymt. periods @ \$ per period   |  |   |  |
| 1004. County property taxes pymt. periods @ \$ per period   |  |   |  |
| 1005. Annual assessments pymt. periods @ \$ per period  |  | 1510.   |  |
| 1006. pymt. periods @ \$ per period   |  |   |  |
| 1007. pymt. periods @ \$ per period   |  |   |  |
| 1008. Aggregate Adjustment <b>0.00</b>  |  | 1511.   |  |
| <b>1100. Title Charges</b>  |  |   |  |
| 1101. Settlement or closing fee to  |  |   |  |
| 1102. Abstract or title search to   |  | 1512.   |  |
| 1103. Title examination to  |  |   |  |
| 1104. Title Insurance binder to   |  |   |  |
| 1105. Document preparation to <b>250.00</b>   |  | 1513.   |  |
| 1106. Notary fees to  |  |   |  |
| 1107. Attorney's fees to<br>(includes above item numbers )  |  | 1514.   |  |
| 1108. Title insurance to<br>(includes above item numbers ) <b>85.00</b>   |  |   |  |
| 1109. Lender's coverage \$  |  | 1515.   |  |
| 1110. Owner's coverage \$   |  |   |  |
| 1111. OFFICIALS TO <b>12.00</b>   |  |   |  |
| 1112.   |  | 1520. TOTAL DISBURSED<br>(enter on line 1603)   |  |
| 1113.   |  |   |  |
| <b>1200. Government Recording And Transfer Charges</b>  |  |   |  |
| 1201. Recording fees:<br>MTG \$15.00-B <b>15.00</b>   |  | <b>N. NET SETTLEMENT</b>  |  |
| 1202. City/county tax/stamps:   |  | 1600. Loan Amount \$ <b>20,477.00</b>   |  |
| 1203. State tax/stamps:   |  |   |  |
| 1204.   |  | 1601. PLUS Cash/Check from Borrower \$  |  |
| 1205.   |  |   |  |
| <b>1300. Additional Settlement Charges</b>  |  | 1602. MINUS Total Settlement Charges (line 1601) \$ <b>477.00</b>   |  |
| 1301. Survey to   |  |   |  |
| 1302. Pest inspection to  |  | 1603. MINUS Total Disbursements to Others (line 1520) \$  |  |
| 1303. Architectural/engineering services to   |  |   |  |
| 1304. Building permit to  |  | 1604. EQUALS Disbursements to Borrower (after expiration of any applicable rescission period required by law) \$ <b>20,000.00</b> |  |
| 1305.   |  |   |  |
| 1306.   |  |   |  |
| Enter on line 1601:   |  | <b>477.00</b>   |  |

is receipt of a completed copy of this statement and any attachments.

*12-13-05*

Date Borrower *Kelly M. Clay*  
**KELLY M. CLAY**

*12-13-05*  
Date

APPLICANT'S NAME AND CURRENT ADDRESS

KRYSTAL M. BARRETT  
KELLY N. CLAY  
835 EAST 11TH STREET  
IDAHO FALLS, ID 83404

APPLICATION SUBMITTED TO  
(AND THESE DISCLOSURES MADE BY)

THE BANK OF COMMERCE-NORTHGATE  
1020 NORTHGATE MILE  
IDAHO FALLS, ID 83401

Application Number 4001853289

Application Received 11-30-2005

By ☐ Mail ☒ In Person  
Date of Disclosure 11-30-2005

SERVICING DISCLOSURE STATEMENT

NOTICE TO FIRST LIEN MORTGAGE LOAN APPLICANTS: THE RIGHT TO COLLECT YOUR MORTGAGE LOAN PAYMENTS MAY BE TRANSFERRED. FEDERAL LAW GIVES YOU CERTAIN RELATED RIGHTS. IF YOUR LOAN IS MADE, SAVE THIS STATEMENT WITH YOUR LOAN DOCUMENTS. SIGN THE ACKNOWLEDGMENT AT THE END OF THIS STATEMENT ONLY IF YOU UNDERSTAND ITS CONTENTS.

Because you are applying for a mortgage loan covered by the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. §2601 *et seq.*) you have certain rights under that Federal law.

This statement tells you about those rights. It also tells you what the chances are that the servicing for this loan may be transferred to a different loan servicer. "Servicing" refers to collecting your principal, interest and escrow account payments, if any. If your loan servicer changes, there are certain procedures that must be followed. This statement generally explains those procedures.

Transfer Practices and Requirements

If the servicing of your loan is assigned, sold, or transferred to a new servicer, you must be given written notice of that transfer. The present loan servicer must send you notice in writing of the assignment, sale or transfer of the servicing not less than 15 days before the effective date of the transfer. The new loan servicer must also send you notice within 15 days after the effective date of the transfer. The present servicer and the new servicer may combine this information in one notice, so long as the notice is sent to you 15 days before the effective date of transfer. The 15 day period is not applicable if a notice of prospective transfer is provided to you at settlement. The law allows a delay in the time (not more than 30 days after a transfer) for servicers to notify you, upon the occurrence of certain business emergencies.

Notices must contain certain information. They must contain the effective date of the transfer of the servicing of your loan to the new servicer, and the name, address, and toll-free or collect call telephone number of the new servicer, and toll-free or collect call telephone numbers of a person or department for both your present servicer and your new servicer to answer your questions. During the 60-day period following the effective date of the transfer of the loan servicing, a loan payment received by your old servicer before its due date may not be treated by the new loan servicer as late, and a late fee may not be imposed on you.

Complaint Resolution

Section 6 of RESPA (12 U.S.C. §2605) gives you certain consumer rights, whether or not your loan servicing is transferred. If you send a "qualified written request" to your servicer, your servicer must provide you with a written acknowledgment within 20 Business Days of receipt of your request. "qualified written request" is a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, which includes your name and account number, and the information regarding your request. Not later than 60 Business Days after receiving your request, your servicer must make any appropriate corrections to your account, or must provide you with a written clarification regarding any dispute. During this 60-Business Day period, your servicer may not provide information to a consumer reporting agency concerning any overdue payment related to such period or qualified written request.

A Business Day is any day in which the offices of the business entity are open to the public for carrying on substantially all of its business operations.

Damages and Costs

Section 6 of RESPA also provides for damages and costs for individuals or classes of individuals in circumstances where servicers are shown to have violated the requirements of that Section.

Servicing Transfer Estimates

The following is the best estimate of what will happen to the servicing of your mortgage loan:

A. ☒ We may assign, sell or transfer the servicing of your loan while the loan is outstanding.

We are able to service your loan, and we ☒ will ☐ will not ☐ haven't decided whether to service your loan.

B. ☐ We do not service mortgage loans (☐ and we have not serviced mortgaged loans in the past three years). We presently intend to assign, sell or transfer the servicing of your mortgage loan. You will be informed about your servicer.

C. ☒ We assign, sell or transfer the servicing of some of our loans while the loan is outstanding depending on the type of loan and other factors.

For the program for which you have applied, we expect to ☐ sell all of the mortgage servicing ☒ retain all of the mortgage servicing ☐ assign sell or transfer \_\_\_\_\_ % of the mortgage servicing.

D. ☐

For all the first lien mortgage loans that we make in the 12 month period after your mortgage loan is funded, we estimate that the percentage of such loans for which we will transfer servicing is between:

N/A 0 to 25% N/A 26 to 50% X 51 to 75% N/A 76 to 100%

This estimate ☒ does ☐ does not include assignments, sales or transfers to affiliates or subsidiaries. This is only our best estimate and it is not binding. Business conditions or other circumstances may affect our future transferring decisions.

A. ☒ We have previously assigned, sold or transferred the servicing of first lien mortgage loans.


B. ☒ This is our record of transferring the servicing of the first lien mortgage loans we have made in the past three years. The percentages have been rounded to the nearest quartile - 0%, 25%, 50%, 75% or 100%.

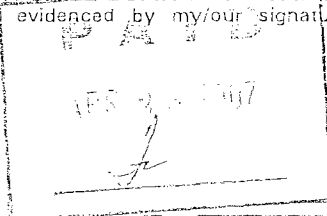
2002 - 50% 2003 - 50% 2004 - 50%

(This information ☒ does ☐ does not include assignments, sales or transfers to affiliates or subsidiaries.)

ACKNOWLEDGMENT OF MORTGAGE LOAN APPLICANT

I have read this disclosure form, and understand its contents, as evidenced by my/our signature(s) below. I/we understand that this acknowledgment is a required part of the mortgage loan application.

  
APPLICANT KRYSTAL M. BARRETT

  
11-30-2005

11-30-2005

DATE

Amended Complaint

Page 89

DATE AND PARTIES: of this Agreement to Provide Insurance (Agreement) is 12-13-05. The parties and their addresses are:

OWNER: KRYSTAL M. BARRETT  
KELLY N. CLAY  
895 EAST 11TH STREET  
IDAHO FALLS, ID 83404

SECURED PARTY: THE BANK OF COMMERCE-NORTHGATE  
1020 NORTHGATE MILE  
IDAHO FALLS, ID 83401

The pronouns "you" and "your" refer to the Secured Party. The pronouns "I," "me" and "my" refer to each person or entity signing this Agreement as Owner.

1. LOAN, LEASE, OR CONTRACT DESCRIPTION (Loan).

A. Date: 12-07-2005  
B. Loan Number:  
C. Loan Amount: 20,477.00  
D. Additional Information:

2. AGREEMENT TO PROVIDE INSURANCE. As part of my loan, I agree to do all of the following (in addition to any requirements specified in the Loan documents).

- A. I will insure the Property as listed and with the coverages shown in the COVERAGES section.  
B. I will have you named on the policy, with the status listed under the STATUS section.  
C. I will arrange for the insurance company to notify you that the policy is in effect and your status has been noted.  
D. I will pay for this insurance, including any fee for this endorsement.  
E. I will keep the insurance in effect until the Property is no longer subject to your security interest. (I understand that the Property may secure debts in addition to any listed in the LOAN DESCRIPTION section.)

3. DESCRIPTION OF PROPERTY. The Property subject to this Agreement is described as follows:

PROPERTY LOCATED AT 4058 STEELHEAD DRIVE, ISLAND PARK, IDAHO, AND 1958 SCHULS TL MOBILE HOME VIN V-568660

4. COVERAGES. I agree to insure the Property according to the following described risks, amount of coverage, and maximum deductible allowed.

☒ If checked, all coverages will be for the full replacement value of the Property.

Homeowner's Coverage: ☐ H.O. ☐ Other (Describe):

Insurable Value: Deductible:

Automobile Coverages: ☐ Fire ☐ Theft ☐ Collision ☐ Comprehensive ☐ Liability ☐ Other

Insurable Value: Deductible: Minimum limits:

Property Coverage: ☒ Fire ☒ Theft ☐ Collision ☐ Comprehensive ☒ Liability ☐ Other

Insurable Value: Deductible: 500.00

5. STATUS. Your status shall be listed on the insurance policy as follows:

☐ Lienholder ☐ Certificate Holder ☐ Additional Insured ☒ Mortgagee ☐ Other

California Real Property: Hazard insurance exceeding the replacement value of the improvements on the property is not required as a condition of this loan.

6. ADDITIONAL TERMS

7. INSURANCE COMPANY. The insurance policy covering the property and the insurance company issuing the policy are as follows:

A. Policy Number: Effective From To

B. Insurance Company Name, Address, and Phone Number:

8. INSURANCE AGENCY AND AGENT. The insurance agency through which I have purchased, or intend to purchase, the required insurance is as follows:

A. Agent Name:

B. Agency Name, Address, and Phone Number:

9. SIGNATURES

SIGNATURES FOR OWNER(S) AND AUTHORIZATION TO INSURANCE AGENT AND COMPANY. By signing below, I agree to the terms contained in this Agreement and acknowledge receipt of a copy of this Agreement. I request the listed insurance company and agency to provide the indicated coverage and list you on the policy with the indicated status. I also request the insurance company or its authorized agent to immediately confirm that the policy is in effect by signing this form and forwarding a copy of the policy to you.

X Krystal M. Barrett  
KRYSTAL M. BARRETT  
X Kelly N. Clay  
KELLY N. CLAY

12-13-05  
Date  
12-13-05  
Date

SIGNATURE FOR SECURED PARTY AND REQUEST FOR CONFIRMATION. Upon receipt of this Agreement, the insurance company or agency named above is requested to confirm the policy coverages shown above.

By X Nolan C. Lee  
NOLAN C. LEE, VICE PRESIDENT

12-13-2005  
Date

SIGNATURE FOR INSURANCE COMPANY AND CONFIRMATION. By signing below, Insurance Company confirms the existence of the insurance coverage agreed to be provided by our insured and that you will be notified, in less than 10 days before cancellation.

[Signature]  
Date

Party at the address listed in the DATE AND PARTIES section.

Systems, Inc., St. Cloud, MN Form AP-GEN 6/13/2000

THE BANK OF COMMERCE-NORTHGATE  
1020 NORTHGATE MILE  
IDAHO FALLS, ID 83401

KRYSTAL M. BARRETT  
KELLY N. CLAY  
895 EAST 11TH STREET  
IDAHO FALLS, ID 83404

Loan Number 4001853289  
Date 12-07-2005  
Loan Amount \$ 20,477.00

LENDER'S NAME AND ADDRESS

BORROWER'S NAME AND ADDRESS

### ERRORS AND OMISSIONS AGREEMENT

The undersigned borrower(s), in consideration of the closing of a certain loan by THE BANK OF COMMERCE-NORTHGATE  
the "Lender" to KRYSTAL M. BARRETT; KELLY N. CLAY

"Borrower(s)" in the above stated  
amount, as evidenced by a promissory note and secured by a Deed of Trust or mortgage against real property located at 4058 STEELHEAD  
DRIVE, ISLAND PARK, ID 83421

and dated the date of this Errors and Omissions Agreement, agree(s), if requested by the "Lender" or its agent, to fully cooperate in the correction, if necessary in the reasonable discretion of the "Lender" of any and all loan closing documents so that all documents accurately describe the loan between the undersigned borrower(s) and the "Lender" and thus allow the "Lender" to sell, convey, seek a guaranty or obtain insurance for, or market said loan to any purchaser, including but not limited to any investor or institution, The Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Department of Housing and Urban Development, the Department of Veterans Affairs, or Municipal Bonding Authority.

The undersigned borrower(s) further agree(s) to comply with all above noted reasonable requests by the "Lender" within thirty (30) days from the date of the mailing of the correction requests by the "Lender". The undersigned borrower(s) agree(s) to assume all costs including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with the "Lender" requests within the specified thirty (30) days.

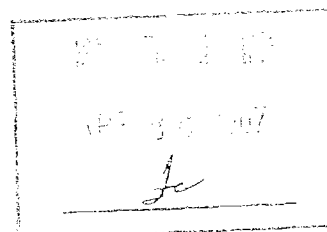
DATED this 7TH day of DECEMBER, 2005

Krystal M. Barrett  
Borrower) KRYSTAL M. BARRETT

Kelly N. Clay  
Borrower) KELLY N. CLAY

Borrower)

Borrower)



# CONSUMER ACCOUNT AGREEMENT

THE BANK OF COMMERCE

**IMPORTANT ACCOUNT OPENING INFORMATION:** Federal law requires us to obtain sufficient information to verify your identity. You may be asked several questions and to provide one or more forms of identification to fulfill this requirement. In some instances we may use outside sources to confirm the information. The information you provide is protected by our privacy policy and federal law.

## OWNERSHIP OF ACCOUNT - CONSUMER

☒ INDIVIDUAL ☐ \_\_\_\_\_  
☐ JOINT - WITH SURVIVORSHIP (and not as tenants in common or community property) ☐ JOINT - NO SURVIVORSHIP (as tenants in common)  
☐ COMMUNITY PROPERTY - NO SURVIVORSHIP  
☐ TRUST - SEPARATE AGREEMENT  
☐ REVOCABLE TRUST OR ☐ PAY-ON-DEATH DESIGNATION AS DEFINED IN THE ACCOUNT TERMS AND CONDITIONS. Name and Address of Beneficiaries: \_\_\_\_\_

DATE OPENED DECEMBER 13, 2005 OPENED BY LLB  
 INITIAL DEPOSIT \$ 20,000.00 FORM: ☒ CASH ☐ CASHIER'S CHECK  
 Form of Identification: \_\_\_\_\_  
 Name and address of someone who will always know your location: \_\_\_\_\_

All Money Accounts will be verified through: CHEX SYSTEMS

## ADDITIONAL INFORMATION:

TYPE AND NUMBER OF ACCOUNT ☒ CHECKING ☐ \_\_\_\_\_  
☐ \_\_\_\_\_  
 If a specified ownership will remain the same for all accounts. ☒ New Account ☐ Existing Account

## ACCOUNT OWNER NAME & ADDRESS

KRYSTAL BARRETT  
 895 E 11TH ST  
 IDAHO FALLS, IDAHO 83404

11-0118479-5  
 INTERNAL USE

NUMBER OF SIGNATURES REQUIRED FOR WITHDRAWAL 1  
☐ This is a Temporary account agreement.

**SIGNATURE(S) - THE UNDERSIGNED AGREE(S) TO THE TERMS OF, AND ACKNOWLEDGE(S) RECEIPT ON TODAY'S DATE OF A COMPLETED COPY OF THIS DOCUMENT, THE ACCOMPANYING TERMS AND CONDITIONS AND THE DISCLOSURE(S) INDICATED BELOW.**

☒ Funds Availability ☒ Electronic Fund Transfers ☒ Cash in Savings  
☒ Substitute Checks ☒ Privacy ☐ \_\_\_\_\_

(1): KRYSTAL BARRETT

(2):

(3):

(4):

Signature(s)

Identifying Info.

☐ AUTHORIZED SIGNER (member) \_\_\_\_\_  
 (Individual Accounts Only)

## BACKUP WITHHOLDING CERTIFICATIONS

TIN: 557-96-9122  
☐ TAXPAYER ID NUMBER - This Taxpayer Identification Number should appear (TIN) is my correct taxpayer identification number.  
☐ EXEMPT RECIPIENTS - I am an exempt recipient under the Internal Revenue Service Regulations.  
 SIGNATURE - I certify under penalties of perjury the statements checked in this section and that I am a U.S. person (including a U.S. resident alien).  
 BACKUP WITHHOLDING - I am not subject to backup withholding either because I have not been notified that I am subject to backup withholding as a result of a failure to report an interest or dividends, or the Internal Revenue Service has notified me that I am no longer subject to backup withholding.  
 X \_\_\_\_\_ (Date)

# TAX INFORMATION INSTRUCTIONS

PLEASE FOLLOW CAREFULLY

## GENERALLY

We must now withhold the percentage allowed under the Internal Revenue Code of the taxable interest paid on this account.

- 1) you fail to furnish your taxpayer identification number (TIN) to us, or
- 2) the Internal Revenue Service notifies us that you furnished an incorrect taxpayer identification number, or
- 3) you are notified that you are subject to backup withholding because you have failed to report all interest and dividend payments, or
- 4) you fail to certify that you are not subject to backup withholding because of a failure to report all interest and dividend payments, or you fail to certify your taxpayer identification number.

## TAXPAYER IDENTIFICATION NUMBER

There are two types of taxpayer identification numbers:

- (a) **SOCIAL SECURITY NUMBERS** - These are nine digit numbers taking the form of 000-00-0000. Social Security Numbers identify and should be used by individual persons and estates of decedents.
- (b) **EMPLOYER IDENTIFICATION NUMBERS** - These are also nine digit numbers taking the form of 00-0000000. These numbers identify and should be used by corporations, partnerships, non-profit associations, certain trusts, and similar non-individual persons.

Generally speaking, interest or dividends earned on an account should be reported to the IRS under the name and taxpayer identification number of the person who owns the principal in the account. This person should report this interest on his income tax return.

Section 6109 of the Internal Revenue Code requires you to provide your taxpayer identification number to us whether or not you file a tax return. These numbers are used to identify the interest and dividends paid to you.

## BACKUP WITHHOLDING

To prevent backup withholding on the interest and dividend payments you receive, you must certify that the taxpayer identification number you provide is correct and that you are not subject to backup withholding because of a failure to report your interest and dividend payments. In order to make these certifications, check the "TAXPAYER ID NUMBER" and "BACKUP WITHHOLDING" boxes on page 1 of this form and sign the certifications.

If you are subject to backup withholding, you should still provide and certify your taxpayer identification number.

## EXEMPT RECIPIENTS

Certain types of accounts are exempted from backup withholding and certain payments of interest are not subject to backup withholding. Review the descriptions of exempt payees set out below and check the "EXEMPT RECIPIENTS" box on page 1 if applicable, then sign the certification.

## NUMBER APPLIED FOR

If you have applied for (or intend to apply for) a number, write "Applied For" in the space for the TIN on page 1. When you receive your number, contact us to complete a new certification. If you do not provide us with your TIN within 60 days we are required to begin backup withholding.

If you do not have a taxpayer identification number or you do not know your number, contact the local office of the Social Security Administration or the Internal Revenue Service.

## NOTICE TO NONRESIDENT ALIENS

In order to prevent the reporting of your interest payments, you should provide your name, address, taxpayer identification number (if any) and certify under penalties of perjury your nonresident alien status. To do this you must provide a certification on a separate document. Failure to provide this certification may result in backup withholding.

## PENALTIES

In addition to the withholding, you may be subject to the following penalties:

- 1) If you fail to give us your correct taxpayer identification number, the IRS may impose a penalty of \$50 for each failure (unless your failure is due to reasonable cause and not willful neglect).
- 2) If you make a false statement which results in an avoidance of withholding or you make a false certification, you may be subject to civil penalties of up to \$500 and criminal penalties including fines and/or imprisonment.
- 3) If you fail to report all of your reportable interest and dividend payments, the IRS may impose a penalty of at least 5% of the underpayment of tax.

## Payees Exempt from Backup Withholding

We are not required to backup withhold if the payee is:

- An organization exempt from tax under section 501(c)(3) or an individual retirement plan.
- The United States or any of its agencies or instrumentalities.
- A state, the District of Columbia, a possession of the United States, or any of their political subdivisions, or instrumentalities.
- A foreign government or any of its political subdivisions, agencies, or instrumentalities.
- An international organization or any of its agencies or instrumentalities.

Other payees that may be exempt from backup withholding include:

- A corporation.
- A foreign central bank or issue.
- A dealer in securities or commodities required to register in the United States, the District of Columbia, or a possession of the United States.
- A futures commission merchant registered with the Commodity Futures Trading Commission.
- A real estate investment trust.
- An entity registered at all times during the tax year under the Investment Company Act of 1940.
- A common trust fund operated by a bank under section 854(a).
- A financial institution.
- A middleman known in the investment community as a nominee or custodian.
- A trust exempt from tax under section 684 or described in section 4947.

Payments of interest not generally subject to backup withholding include the following:

- Payments of interest on obligations issued by individuals. Note: You may be subject to backup withholding if the interest is \$600 or more and is paid in the course of the payer's trade or business and you have not provided your correct taxpayer identification number to the payer.
- Payments of tax-exempt interest (including exempt interest dividends under section 852).
- Payments described in section 6049(b)(5) to non-resident aliens.
- Payments on tax-free covenant bonds under section 1451.
- Payments made by certain foreign organizations.
- Payments of mortgage or student loan interest.

Exempt payees described above should complete this form to avoid possible erroneous backup withholding. Certain payments exempt from backup withholding are nevertheless subject to information reporting. If you file this form with the payer, furnish your taxpayer identification number and certify the correctness of that number and certify that you are an exempt recipient.

Certain payments other than interest, dividends, and patronage dividends that are not subject to information reporting are also not subject to backup withholding. For details see the regulations under sections 6041, 6041A(a), 6045, and 6050A.

509 - 6750

Request for Reconveyance

To: Alliance Title & Escrow Corp., 130 E. Main Street, Rexburg, Idaho

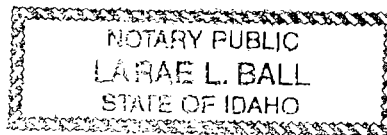
The Bank of Commerce - Northgate is the legal owner and holder of all indebtedness secured by that certain Deed of Trust dated December 7, 2005, and recorded December 13, 2005, as Fremont County Instrument Number 499643. All sums secured have been fully paid. You are hereby requested and directed to cancel all evidence of indebtedness secured by said Deed of Trust and to reconvey, without warranty, the estate now held by you under the same. Please deliver said reconveyance to Kelly N. Clay, c/o Fuller & Carr, P.O. Box 50935, Idaho Falls, Idaho 83405-0935.

THE BANK OF COMMERCE - NORTHGATE

By: [Signature]  
Its: \_\_\_\_\_

SUBSCRIBED AND SWORN to before me this 26<sup>th</sup> day of April, 2007.

[Signature]  
Notary public for Idaho  
Residing at: IDAHO FALLS, ID  
My commission expires: 11-09-12



# EXHIBIT D





March 2, 2007

Kelly N. Clay  
4470 North 25<sup>th</sup> East  
Idaho Falls, Idaho 83401

RE: Loan No. 4001853289

Dear Kelly:

The above referenced loan is currently past due two payments plus late charges making a total past due amount of \$601.08.

As a joint signer with Krystal M. Barrett on this loan, you are also responsible for the payment terms on the loan. Please make arrangements to bring this loan current.

Please make your payment to The Bank of Commerce, P. O. Box 1887, Idaho Falls, Idaho 83403 or drop it by the office at 1455 Northgate Mile, Idaho Falls, Idaho. If you have any questions, please call me at 535-0640.

The Bank of Commerce

Nolan C. Lee  
Vice President

fc

# EXHIBIT E



Microfilm No. 509506  
 14 Day 27 2007  
 At 4:10 O'Clock PM  
 ABIE MACE  
 FREMONT CO RECORDER  
 Fee \$ 3 Deputy  
 Recorded at Request of  
ALLIANCE TITLE & ESCROW

Customer Reference No:  
 ATEC Reference No. 3040725727KLJ

### DEED OF RECONVEYANCE

Pursuant to a written request made by the beneficiary, the undersigned, as trustee in the deed of trust executed by

Krystal M. Barrett, as sole and separate property, Kelly N. Clay

to The Bank of Commerce recorded December 13, 2005 as Instrument No 499643 Records of Fremont County, Idaho, does hereby GRANT and RECONVEY unto the parties LEGALLY ENTITLED THERETO, without warranty, all the estate and interest derived to the trustee under said deed of trust, in the lands therein described.

May 11, 2007



Alliance Title and Escrow Corp.

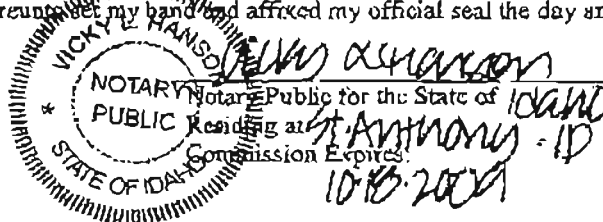
By

[Signature]  
 Daryl Olsen, Vice President

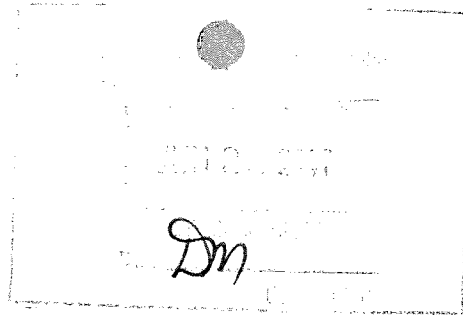
State of Idaho

County of Madison

On this 11th day of May, 2007, before me, a Notary Public in and for said state, personally appeared Daryl Olsen known to me to be the Vice President of the Corporation, and acknowledged to me that pursuant to a Resolution of the Board of Directors, he/she executed the foregoing in said Corporation name. IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



MARK R. FULLER (ISB No. 2698)  
FULLER & CARR  
410 MEMORIAL DRIVE, SUITE 201  
P.O. BOX 50935  
IDAHO FALLS, ID 83405-0935  
TELEPHONE: (208) 524-5400



ATTORNEY FOR DEFENDANTS KELLY CLAY

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO IN AND FOR  
THE COUNTY OF FREMONT**

|                               |   |                              |
|-------------------------------|---|------------------------------|
| KRYSTAL M. KINGHORN, f/k/a    | ) | Case No. CV-07-306           |
| KRYSTAL M. BARRETT,           | ) |                              |
|                               | ) |                              |
| Plaintiff,                    | ) |                              |
|                               | ) | ANSWER OF DEFENDANT KELLY N. |
| v.                            | ) | CLAY                         |
|                               | ) |                              |
|                               | ) |                              |
| KELLY N. CLAY, an individual, | ) |                              |
| BRP, INCORPORATED, an Idaho   | ) |                              |
| corporation, and THE BANK OF  | ) |                              |
| COMMERCE, an Idaho Banking    | ) |                              |
| corporation,                  | ) |                              |
|                               | ) |                              |
| Defendants.                   | ) |                              |
|                               | ) |                              |

COMES NOW the Defendant, Kelly Clay (hereafter "Clay") and in response to the Complaint filed by Plaintiff Krystal M. Kinghorn, f/k/a Krystal M. Barrett, (hereafter "Kinghorn"), states and alleges as follows:

1. Clay denies each and every allegation set forth in the Complaint except as expressly admitted herein.
2. Plaintiff's Complaint fails to state a cause of action upon which relief can be granted.
3. In answer to paragraph 1, Clay admits the same.
4. In answer to paragraph 2, Clay admits the same.

ANSWER OF DEFENDANT KELLY N. CLAY - 1

5. In answer to paragraph 3, Clay admits the same.
6. In answer to paragraph 4, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.
7. In answer to paragraph 5, Clay admits the same.
8. In answer to paragraph 6, Clay admits the same.
9. In response to paragraph 7, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.
10. In response to paragraph 8, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.
11. In response to paragraph 9, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.
12. In response to paragraph 10, Clay admits the same.
13. In response to paragraph 11, Clay denies the same.
14. In response to paragraph 12, Clay denies the same.
15. In response to paragraph 13, Clay denies the same.
16. In response to paragraph 14, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.
17. In response to paragraph 15, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.
18. In response to paragraph 16, Clay denies the same.
19. In response to paragraph 17, Clay does not have

sufficient information to either admit or deny, therefore Clay denies the same.

20. In response to paragraph 18, Clay denies the same. Clay did not offer to co-sign on the loan Kinghorn requested the same.

21. In response to paragraph 19, Clay denies the same.

22. In response to paragraph 20, Clay admits the same.

23. In response to paragraph 21, Clay admits the same.

24. In response to paragraph 22, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.

25. In response to paragraph 23, Clay admits the same.

26. In response to paragraph 24, Clay admits the same.

27. In response to paragraph 25, Clay admits the same and affirmatively asserts that the date in the acknowledgment appears to be a typographical error.

28. In response to paragraph 26, Clay admits the same.

29. In response to paragraph 27, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.

30. In response to paragraph 28, Clay admits the same.

31. In response to paragraph 29, Clay denies the same.

32. In response to paragraph 30, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.

33. In response to paragraph 31, Clay admits the same.

34. In response to paragraph 32, Clay does not have

sufficient information to either admit or deny, therefore Clay denies the same.

35. In response to paragraph 33, Clay admits that he made two payments to the Bank as a result of Kinghorn's failure to make the payments herself. Clay denies the rest of paragraph 33. Clay denies that such payments were voluntary.

36. In response to paragraph 34, Clay admits the same.

37. In response to paragraph 35, Clay admits the same.

38. In response to paragraph 36, Clay admits the same.

39. In response to paragraph 37, Clay admits the same.

40. In response to paragraph 38, Clay admits the same.

41. In response to paragraph 39, Clay admits the same.

42. In response to paragraph 40, Clay admits the same.

43. In response to paragraph 41, Clay re-alleges the admissions and denials to paragraphs 1-40 set forth above.

44. In response to paragraph 42, Clay admits the same.

45. In response to paragraph 43, Clay admits the same.

46. In response to paragraph 44, Clay admits that the Quitclaim deed was absolute in form. Clay denies all other allegations in paragraph 44.

47. In response to paragraph 45, Clay admits the same.

48. In response to paragraph 46, Clay denies the same.

49. In response to paragraph 47, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.

50. In response to paragraph 48, Clay denies the same.

51. In response to paragraph 49, Clay denies the same.

52. In response to paragraph 50, Clay admits the same.

53. In response to paragraph 51, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.

54. In response to paragraph 52, Clay re-alleges the admissions and denials to paragraphs 1-51 as set forth above.

55. In response to paragraphs 53-57, Clay denies the same.

56. In response to paragraph 58, Clay re-alleges the admissions and denials to paragraphs 1-57 as set forth above.

57. In response to paragraph 59, Clay admits that it sold the property to BRP. Clay denies that Kinghorn had a right of redemption on the property.

58. In response to paragraph 60, Clay admits that it received the sum of \$30,000.00 from BRP for the Property.

59. In response to paragraph 61, Clay denies the same.

60. In response to paragraph 62, Clay has no knowledge regarding Plaintiff's beliefs, and therefore Clay denies the same.

61. In response to paragraph 63, Clay admits the same.

62. In response to paragraph 64, Clay denies that there were any defects in Clay's title to the Property and further denies any knowledge of any alleged defects by BRP.

63. In response to paragraph 65, Clay denies that he committed a breach of constructive trust and further denies any knowledge of any alleged breach of constructive trust by BRP.

64. In response to paragraph 66, Clay denies that there were any defects in Clay's title or that Clay committed a breach of constructive trust. Clay further denies that BRP bought the



Property for an amount substantially below fair market value.

65. In response to paragraph 67, Clay denies that BRP is not a *bona fide* purchaser in good faith, for value, of the Property.

66. In response to paragraph 68, Clay denies the same.

67. In response to paragraph 69, Clay re-alleges the admissions and denials to paragraphs 1-68 as set forth above.

68. In response to paragraphs 70-76, Clay denies the same.

69. In response to paragraph 77, Clay re-alleges the admissions and denials to paragraphs 1-76 as set forth above.

70. In response to paragraph 78, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.

71. In response to paragraph 79, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.

72. In response to paragraph 80, Clay admits the same and affirmatively asserts that the acknowledgment appears to contain a typographical error.

73. In response to paragraph 81, Clay admits the same.

74. In response to paragraph 82, Clay denies the same.

75. In response to paragraph 83, Clay admits the same.

76. In response to paragraph 84, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.

77. In response to paragraph 85, Clay denies the same.

78. In response to paragraph 86, Clay denies the same.

79. In response to paragraph 87, Clay denies the same.

80. In response to paragraph 88, Clay re-alleges the admissions and denials in paragraphs 1-87 as set forth above.

81. In response to paragraphs 89-93, Clay does not have sufficient information to either admit or deny, therefore Clay denies the same.

82. In response to paragraphs 94-99, Clay denies the same.

83. In response to paragraph 100, Clay re-alleges the admissions and denials in paragraphs 1-99 as set forth above.

84. In response to paragraph 101, Clay admits the same.

85. In response to paragraph 102, Clay denies the same.

86. In response to paragraph 103, Clay admits the same.

87. In response to paragraph 104, Clay admits the agreement was prepared by Clay's attorney.

88. In response to paragraph 105, Clay denies the same.

89. In response to paragraph 106, Clay re-alleges the admissions and denials in paragraphs 1-105 as set forth above.

90. In response to paragraph 107, Clay denies the same.

91. In response to paragraph 108, Clay denies the same.

#### **AFFIRMATIVE DEFENSES**

92. The Plaintiff's claims are barred by the doctrine of independent intervening cause. Any damages alleged by Plaintiff were caused by an independent intervening cause and not by any action or inaction by the Defendant.

93. The Plaintiff's claims are barred based on the doctrine of waiver.

94. The Plaintiff's claims are barred based on the doctrine

89. In response to paragraph 106, Clay re-alleges the admissions and denials in paragraphs 1-105 as set forth above.

90. In response to paragraph 107, Clay denies the same.

91. In response to paragraph 108, Clay denies the same.

#### **AFFIRMATIVE DEFENSES**

92. The Plaintiff's claims are barred by the doctrine of independent intervening cause. Any damages alleged by Plaintiff were caused by an independent intervening cause and not by any action or inaction by the Defendant.

93. The Plaintiff's claims are barred based on the doctrine of waiver.

94. The Plaintiff's claims are barred based on the doctrine of estoppel.

95. The Plaintiff's claims are barred based on the doctrine of release.

96. The Plaintiff's claims are barred because she has failed to mitigate her damages.

97. The Plaintiff's claims are barred due to commercial impracticability.

98. The Plaintiff's claims are barred by her breach of the Loan Guarantee Agreement by her failure to obtain the release of Clay as guarantor on or before January 1, 2007, and by her failure to timely make loan payments to the Bank of Commerce.

99. To the extent Kinghorn has failed to set forth her claims with sufficient particularity to permit Clay to raise all

ANSWER OF DEFENDANT KELLY N. CLAY - 9

appropriate defenses, Clay reserves the right to seek leave of the Court to amend or supplement this Answer, including Affirmative Defenses, to specify further grounds for denying the claims and causes of action that are the subject of this action.

**PRAYER**

WHEREFORE, Clay respectfully requests the following relief:

1. That Kinghorn recover nothing by reason of her Complaint and that all such claims be dismissed;
2. That Clay be awarded all of his costs and attorney fees.
5. For such other relief, legal or equitable, to which Clay has any right or entitlement.

DATED this 20 day of June, 2007.



---

Mark R. Fuller  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

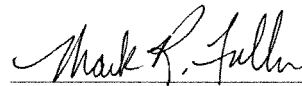
I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorneys listed below on this 20 day of June, 2007:

Document Served: ANSWER OF DEFENDANT KELLY N. CLAY

Attorneys Served:

E.W. Pike, Esq.  
Erika Lessing  
E.W. PIKE & ASSOCIATES, P.A.  
P.O. Box 2949  
Idaho Falls, ID 83403-2949  
Fax: (208) 528-6447

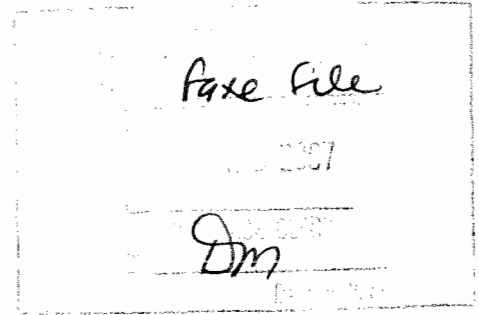
|               |               |
|---------------|---------------|
| <u>+</u>      | U.S. Mail     |
| <u>      </u> | Facsimile     |
| <u>      </u> | Hand Delivery |



Mark R. Fuller  
FULLER & CARR

ANSWER OF DEFENDANT KELLY N. CLAY - 10

Bradley J. Dixon, ISB No. 6167  
E-mail: *bjdixon@stoel.com*  
Samia E. McCall, ISB No. 7284  
E-mail: *semccall@stoel.com*  
**STOEL RIVES LLP**  
101 South Capitol Boulevard, Suite 1900  
Boise, ID 83702-5958  
Telephone: (208) 389-9000  
Facsimile: (208) 389-9040



Attorneys for Defendant BRP, Incorporated

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

vs.

KELLY N. CLAY, an individual, BRP,  
INCORPORATED, an Idaho corporation, and  
THE BANK OF COMMERCE, an Idaho  
banking,

Defendants.

Case No. CV 07-306

**ANSWER TO AMENDED  
COMPLAINT**

COMES NOW Defendant BRP, Incorporated ("BRP" or "Defendant"), by and  
through its undersigned counsel and hereby answers the Amended Complaint  
("Complaint") filed by Plaintiff Krystal M. Kinghorn f/k/a Krystal M. Barrett  
("Plaintiff"), as follows:

Defendant hereby denies each and every allegation set forth in Plaintiff's Amended Complaint not hereinafter expressly admitted.

### **PARTIES**

1. In response to paragraphs 1 and 2 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

2. In response to paragraphs 3 through 5 of Plaintiff's Complaint, BRP admits the allegations contained therein.

3. In response to paragraph 6 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

### **FACTS**

4. In response to paragraphs 7 and 8 of Plaintiff's Complaint, BRP admits that Exhibit A to the Complaint contains documentation suggesting that on or about May 12, 2000, Plaintiff purchased real property located at Lot 15, Block 6, Buffalo River Estate Division No. 2 in Fremont County, Idaho. However, Exhibit A is attached to an unverified complaint. As such BRP states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

5. In response to paragraphs 9 through 23 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

6. In response to paragraph 24 of Plaintiff's Complaint, BRP admits that the Complaint attaches documentation suggesting that on or about December 13, 2005, Plaintiff executed a Deed of Trust in favor of The Bank of Commerce, and that the attached Deed of Trust lists, as Grantors, Krystal M. Barrett and Kelly N. Clay. However, such documentation is attached to an unverified complaint. As such, BRP lacks knowledge or sufficient information to form a belief as to the truth of the allegations contained therein and, on that basis, denies the allegations contained therein.

7. In response to paragraphs 25 and 26 of Plaintiff's Complaint, BRP states that the Deed of Trust is attached to the Complaint without verification. As such, BRP lacks knowledge or sufficient information to form a belief as to the truth of the allegations contained therein and, on that basis, denies the allegations contained therein.

8. In response to paragraphs 27 through 30 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

9. In response to paragraph 31 of Plaintiff's Complaint, BRP admits the Complaint attaches Exhibit D indicating that on or about March 2, 2007 Nolan Lee sent notice to Clay that Krystal had missed two payments on her loan with the Bank. Exhibit D is attached without verification. Thus, BRP lacks knowledge or sufficient information to form a belief as to the truth of the allegations contained therein and, on that basis, denies the allegations contained therein.

10. In response to paragraphs 32 through 36 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the



allegations contained therein and, on that basis, denies each and every allegation contained therein.

11. In response to paragraphs 37 through 39 of Plaintiff's Complaint, BRP admits the allegations contained therein.

12. In response to paragraph 40 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

#### **COUNT ONE – MORTGAGE AND REDEMPTION**

13. In response to paragraph 41 of Plaintiff's Complaint, BRP incorporates its responses to the allegations as set forth in paragraphs 1 through 12 above.

14. In response to paragraphs 42 through 51 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

#### **COUNT TWO – CONSTRUCTIVE TRUST**

15. In response to paragraph 52 of Plaintiff's Complaint, BRP incorporates its responses to the allegations as set forth in paragraphs 1 through 14 above.

16. In response to paragraphs 53 through 57 of Plaintiff's Complaint, BRP states that such allegations are not asserted against it, thus requiring no response. However, to the extent that such allegations are intended to be asserted against BRP, BRP denies the allegations contained therein.

### **COUNT THREE – INVALID TRANSFER**

17. In response to paragraph 58 of Plaintiff's Complaint, BRP incorporates its responses to the allegations as set forth in paragraphs 1 through 16 above.

18. In response to paragraph 59 of Plaintiff's Complaint, BRP admits that the subject property was sold to it on or about May 3, 2007, but BRP lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and, on that basis, denies each and every remaining allegation contained therein.

19. In response to paragraphs 60 through 62 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

20. In response to paragraph 63 of Plaintiff's Complaint, BRP admits the allegations contained therein.

21. In response to paragraphs 64 through 68 of Plaintiff's Complaint, BRP denies the allegations contained therein.

### **COUNT FOUR – FRAUD**

22. In response to paragraph 69 of Plaintiff's Complaint, BRP incorporates its responses to the allegations as set forth in paragraphs 1 through 21 above.

23. In response to paragraphs 70 through 76 of Plaintiff's Complaint, BRP states that such allegations are not asserted against it, thus requiring no response. However, to the extent that such allegations are intended to be asserted against BRP, it denies the allegations contained therein.

**COUNT FIVE – SLANDER OF TITLE**

24. In response to paragraph 77 of Plaintiff's Complaint, BRP incorporates its responses to the allegations as set forth in paragraphs 1 through 23 above.

25. In response to paragraphs 78 through 80 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

26. In response to paragraph 81 of Plaintiff's Complaint, BRP states that the documentation relied on for the allegation is attached to the Complaint without verification. As such, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

27. In response to paragraph 82 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

28. In response to paragraphs 83 and 84 of Plaintiff's Complaint, BRP states that the documentation relied on for the allegation is attached to the Complaint without verification. As such, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

29. In response to paragraphs 85 through 87 of Plaintiff's Complaint, BRP states that such allegations are not asserted against it, thus requiring no response.

However, to the extent that such allegations are intended to be asserted against BRP, BRP denies the allegations contained therein.

**COUNT SIX – COVENANT OF GOOD FAITH AND FAIR DEALING**

30. In response to paragraph 88 of Plaintiff's Complaint, BRP incorporates its responses to the allegations set forth in paragraphs 1 through 29 above.

31. In response to paragraphs 89 and 90 of Plaintiff's Complaint, BRP lacks knowledge or sufficient information to form a belief as to the truth of the allegations contained therein and, on that basis, denies the remaining allegations contained therein.

32. In response to paragraphs 91 through 99 of Plaintiff's Complaint, BRP states that such allegations are not asserted against it, thus requiring no response. To the extent such allegations are intended to be asserted against BRP, BRP denies the allegations contained therein

**COUNT SEVEN – AMBIGUOUS CONTRACT**

33. In response to paragraph 100 of Plaintiff's Complaint, BRP incorporates its responses to the allegations as set forth in paragraphs 1 through 32 above.

34. In response to paragraphs 101 through 103 of Plaintiff's Complaint, BRP states that the documentation relied upon for these allegations is attached to the Complaint without verification. Further, any provisions from a Loan Guaranty Agreement or the meanings of such provisions speak for themselves and Plaintiff's allegations concerning such do not require a response.

35. In response to paragraphs 104 and 105 of Plaintiff's Complaint, BRP lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, on that basis, denies each and every allegation contained therein.

**COUNT EIGHT – ATTORNEY FEES AND COSTS**

36. In response to paragraph 106 of Plaintiff's Complaint, BRP incorporates its responses to the allegations as set forth in paragraphs 1 through 35 above.

37. Paragraphs 107 and 108 of Plaintiff's Complaint present questions of law for the court to decide and therefore constitute averments to which no responsive pleading is required pursuant to Rule 8(d) I.R.C.P. and are thereby denied.

**AFFIRMATIVE AND OTHER DEFENSES**

BRP has not yet had a reasonable opportunity to complete discovery in this matter. To the extent additional facts and circumstances may hereafter be discovered which may support additional defenses, BRP reserves the right to amend its Answer to allege additional defenses when discovered.

**FIRST DEFENSE**

Plaintiff's Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Idaho Rule of Civil Procedure 12(b).

**SECOND DEFENSE**

Plaintiff's damages, if any, were the result of her actions and failures to act.

**THIRD DEFENSE**

Plaintiff failed to properly mitigate damages.

**FOURTH DEFENSE**

Plaintiff's claims are barred in whole or in part by the doctrines of estoppel, waiver, laches, ratification, acquiescence, consent, accord and satisfaction and release.

**FIFTH DEFENSE**

Plaintiff's claims are barred due to the doctrine of unclean hands.

#### **SIXTH DEFENSE**

BRP asserts that the Complaint is barred, in whole or in part, by the Plaintiff's failure to comply with the terms of contractual obligations and/or that BRP is entitled to a setoff/offset in an amount to be proven at trial.

#### **SEVENTH DEFENSE**

Some or all of the Plaintiff's claims are barred by the doctrine of impossibility of performance and/or impracticability of performance.

#### **EIGHTH DEFENSE**

BRP asserts that the Complaint is barred by the Plaintiff's prior material breaches of contract.

#### **NINTH DEFENSE**

Plaintiff's damages, if any, were caused by and were a direct result of the actions of the Plaintiff and, accordingly, the Plaintiff cannot recover for the same.

#### **TENTH DEFENSE**

Damages sustained by the Plaintiff, if any, are the result of independent, intervening, and/or superseding causes, including, but not limited to, acts and omissions of the Plaintiff or third parties.

#### **ELEVENTH DEFENSE**

No act or omission of BRP was a proximate cause or cause in fact of damages, if any, suffered by the Plaintiff.

#### **TWELFTH DEFENSE**

BRP had no actual or constructive knowledge of any defect of title prior to purchasing the property and thus was a bona fide purchaser.

**DEMAND FOR JURY TRIAL**

BRP reserves its right to demand a jury trial on claims or issues that are appropriate for jury determination.

**ATTORNEY FEES**

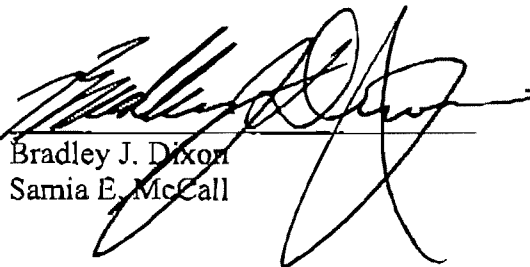
BRP requests attorney's fees and costs under applicable law including, but not limited to, Idaho Code § 12-120 and Idaho Code § 12-121.

WHEREFORE, BRP respectfully requests the following relief:

- a. That Plaintiff's Amended Complaint be dismissed with prejudice and without granting any relief requested by Plaintiff;
- b. That BRP be awarded its costs and expenses incurred in defending this lawsuit, including appropriate and reasonable attorneys' fees and costs allowed by applicable law, including, but not limited to, Idaho Code § 12-120 and Idaho Code § 12-121; and
- c. Such other and further relief, at law or in equity as the Court deems warranted and just.

DATED this 5<sup>th</sup> day of July, 2007.

Stoel Rives LLP



Bradley J. Dixon  
Samia E. McCall

## CERTIFICATE OF SERVICE

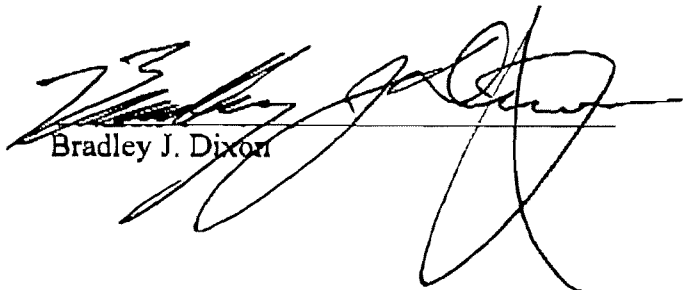
I HEREBY CERTIFY that on this 5th day of July, 2007, I caused to be served a true copy of the foregoing **ANSWER TO AMENDED COMPLAINT**, by the method indicated below, addressed to the following:

E.W. Pike  
Erika Lessing  
E.W. PIKE & ASSOCIATES, P.A.  
151 N. Ridge Avenue, Suite 210  
Idaho Falls, ID 83403-2949  
Facsimile: (208) 528-6447  
ewp@pikelaw.com

☐ Via U.S. Mail  
☐ Via Hand-Delivery  
☐ Via Overnight Delivery  
☒ Via Facsimile  
☐ Via Email

Mark R. Fuller  
Fuller & Carr  
410 Memorial Drive, Suite 210  
Idaho Falls, ID 83405-0935  
fullerandcarr@ida.net

☐ Via U.S. Mail  
☐ Via Hand-Delivery  
☐ Via Overnight Delivery  
☒ Via Facsimile  
☐ Via Email



Bradley J. Dixon



Douglas R. Nelson  
Brian T. Tucker  
ANDERSON NELSON HALL SMITH, P.A.  
490 Memorial Drive  
Post Office Box 51630  
Idaho Falls, Idaho 83405-1630  
Telephone (208) 522-3001  
Fax (208) 523-7254  
Idaho State Bar Numbers 1580& 5236

Attorneys for The Bank of Commerce

**RETURNED**  
☐ Fee Not Paid  
☐ Wrong Filing Fee  
☐ No Return of Service  
☒ WRIT Not Returned  
☐ Other

AUG 8 2007

DM

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

vs.

KELLY N. CLAY, an individual, BRP,  
INCORPORATED, an Idaho corporation,  
and THE BANK OF COMMERCE, an  
Idaho Banking corporation,

Defendant.

Case No. CV-07-306

**THE BANK OF COMMERCE'S  
ANSWER TO AMENDED  
COMPLAINT**

COMES NOW the Defendant, The Bank of Commerce, by and through its attorney of record, and answers and alleges as follows:

**FIRST AFFIRMATIVE DEFENSE**

Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

**SECOND AFFIRMATIVE DEFENSE**

Defendant The Bank of Commerce denies each and every allegation or averment of the Plaintiffs' Complaint not specifically admitted.

THE BANK OF COMMERCE'S ANSWER TO AMENDED COMPLAINT - 1

## ANSWER

In answering Plaintiffs' Amended Complaint, Defendant The Bank of Commerce:

1. Admits Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 14, 20, 21, 22, 23, 26, 28, 35, 39, 42, 43, 45, 50, 78, 81, 83 and 84.
2. Denies Paragraphs 17, 32, 79, 82, 85, 86, 87, 90, 91, 92, 93, 94, 99, 107 and 108.
3. The Bank of Commerce is without sufficient information to form a belief as to the allegations contained in Paragraphs 9, 10, 11, 12, 13, 16, 18, 19, 29, 34, 36, 37, 38, 40, 44, 46, 48, 51, 89, 95, 96, 97, 98 and therefore deny the same.
4. In answering Paragraph 15 of Plaintiffs' Amended Complaint The Bank of Commerce admits that the property was free and clear of encumbrances except for taxes that were outstanding.
5. In answering Paragraph 24 of Plaintiffs' Amended Complaint The Bank of Commerce denies that Clay had no interest or title to said property but admits the remainder of the paragraph.
6. In answering Paragraph 25 of Plaintiffs' Amended Complaint The Bank of Commerce admits that the document purports to have been notarized on December 7, 2005 however this was a typographical error and the document in fact was notarized on December 14, 2005.
7. In answering Paragraph 27 of Plaintiffs' Amended Complaint the Defendant The Bank of Commerce admits that the Plaintiffs received the loan proceeds of \$20,477.00 but deny the remainder of that paragraph.
8. In answering Paragraph 30 of Plaintiffs' Amended Complaint The Bank of Commerce admits that fourteen installment payments of \$270.25 were paid but all those payments were not made by the Plaintiffs. Furthermore, the Defendant denies that there was a fifteen day grace period.
9. In answering Paragraph 30 of Plaintiffs' Amended Complaint The Bank of Commerce admits that the letter referenced was sent to Clay but again deny the reference to a fifteen day grace period.
10. In answering Paragraph 33 of Plaintiffs' Amended Complaint the Defendant The Bank of Commerce admits that Clay voluntarily made two payments but again deny that the reference to a fifteen day grace period.
11. In answering paragraph 41 of Plaintiffs' Complaint The Bank of Commerce admits

and deny each of the realleged paragraphs of Plaintiffs' Complaint as set forth above.

12. In answering Paragraph 47, of Plaintiffs' Amended Complaint The Bank of Commerce admits that there were no encumbrance other than taxes.

13. In answering Paragraph 49, of Plaintiffs' Amended Complaint The Bank of Commerce alleges that the document speaks for itself.

14. In answering Paragraphs 52, 58, 69, 77, 88, 100, and 106 of Plaintiffs' Complaint The Bank of Commerce admits and deny each of the realleged paragraphs of Plaintiffs' Complaint as set forth above.

15. In answering Paragraphs 53 through 57, 59 through 68, 70 through 76, and 100 through 105 of Plaintiffs' Amended Complaint contains allegations that are not asserted against The Bank of Commerce thus requiring no response by The Bank of Commerce. However, to the extent such allegations are intended to be asserted against The Bank of Commerce, The Bank of Commerce is without sufficient information to form a belief as to the truth of the allegations contained therein and on that basis denies each and every allegation contained therein.

16. In answering Paragraph 80, of Plaintiffs' Complaint The Bank of Commerce denies that the Deed of Trust was notarized on December 7, 2005 and affirmatively allege that the December 7, 2005 date is a typographical error and should have been dated December 13, 2005 when the Deed of Trust was actually signed and notarized.

### **THIRD AFFIRMATIVE DEFENSE**

The Plaintiff assumed the risk of the adverse consequences of her dealings with the other co-defendants.

### **FOURTH AFFIRMATIVE DEFENSE**

The Plaintiffs' claim should be barred by the doctrine of independent intervening cause, by her contributory negligence and own breach of agreements with third parties and not by any action or inaction by the Defendant The Bank of Commerce.

### **FIFTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred by the Doctrine of Waiver, and/or Estoppel, and/or Release.

### **SIXTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred due to her failure to mitigate damages.

#### **SEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred as a result of her actions and failures to act.

#### **EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred based on the Doctrine of Estoppel, Waiver, Laches, Ratification, Acquiescence, Consent, Accord and Satisfaction, and Release.

#### **NINTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred based on the Doctrine of Unclean Hands.

#### **TENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred because no act or admission by The Bank of Commerce was the proximate cause or cause in fact of any damages suffered by the Plaintiff.

#### **ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred due to Plaintiffs' prior material breaches of her agreements with the Defendants.

#### **ATTORNEY FEES**

The Bank of Commerce has been forced to retain counsel to defend this matter and is entitled to attorneys fees pursuant to the parties agreements, Idaho Code § 12-120, § 12-121.

WHEREFORE, The Bank of Commerce respectfully requests relief as follows:

- A. That Plaintiffs' Amended Complaint be dismissed with prejudice and that they take nothing thereby.
- B. For an award of The Bank of Commerce's attorney's fees and Court costs as provided by statute and/or court rule.
- D. For such other and further relief as the Court deems just and proper.

DATED this 3<sup>rd</sup> day of August, 2007.

  
\_\_\_\_\_  
DOUGLAS R. NELSON

## CERTIFICATE OF MAILING

I hereby certify that I served a true copy of the foregoing document upon the following this 3 day of August, 2007, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

E. W. Pike  
Erika Lessing  
E. W. Pike & Associates, P.A.  
151 N. Ridge Ave., Suite 210  
P.O. Box 2949  
Idaho Falls, Idaho 83403-2949

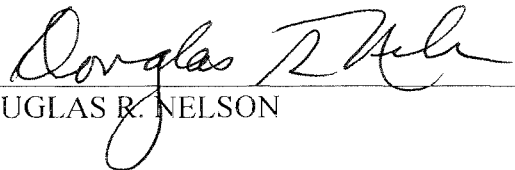
☒ U.S. Mail  
☐ Facsimile  
☐ Hand Deliver

Mark R. Fuller  
Fuller & Carr  
410 Memorial Dr., Ste. 201  
P.O. Box 50935  
Idaho Falls, Idaho 83405

☒ U. S. Mail  
☐ Facsimile  
☐ Hand Deliver

Bradley J. Dixon  
Samia E. McCall  
Stoel Rives, LLP  
101 South Capital Boulevard, Suite 1900  
Boise, Idaho 83702

☒ U.S. Mail  
☐ Facsimile  
☐ Hand Deliver

  
\_\_\_\_\_  
DOUGLAS R. NELSON

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP,  
INCORPORATED, an Idaho corporation,  
and THE BANK OF COMMERCE, an  
Idaho Banking corporation,

Defendants.

Case No. CV-07-0306

OPINION, DECISION, AND ORDER  
ON DEFENDANT THE BANK OF  
COMMERCE'S MOTION FOR  
SUMMARY JUDGMENT

FILED IN CHAMBERS  
AT IDAHO FALLS  
BONNEVILLE COUNTY  
HONORABLE JON J. SHINDURLING  
DATE May 30<sup>th</sup> 2008  
TIME 11:13 a.m.  
DEPUTY CLERK [Signature]

I.

**FACTUAL AND PROCEDURAL BACKGROUND**

In May 2000 Krystal Kinghorn purchased Lot 15, Block 6, Buffalo River Estates Division No. 2, Fremont County. The property was conveyed to Ms. Kinghorn and her husband. In August 2005 Ms. Kinghorn's husband executed a Quitclaim Deed in favor of Ms. Kinghorn on the property. In the Fall of 2005 Ms. Kinghorn and her husband divorced.

In November 2005 Ms. Kinghorn approached The Bank of Commerce ("the Bank") and applied for a \$20,000 loan. Ms. Kinghorn agreed to pledge the property and a mobile home on the property as security for the loan. The Bank required Ms. Kinghorn to obtain a co-signor for the loan and a Deed of Trust on the property. Kelly Clay agreed to co-sign the loan. In December 2005, Ms. Kinghorn executed the bank loan documents, including the note, the Bank's Deed of Trust, Truth-in-Lending Disclosures, Settlement Statement, Servicing Disclosure Statement, Agreement to Provide Insurance, Errors and Omissions Agreement, and Consumer Account

DOCUMENT

ORIGINAL

Agreement. Nolan Lee, a representative of the bank, notarized Ms. Kinghorn's signature on the documents.

Ms. Kinghorn was able to make payments on the loan for the first year of the loan period, but on 2 March 2007, Mr. Clay received written notice that Ms. Kinghorn had missed two payments on the loan. On 8 March 2007, Mr. Clay made two payments on the loan. On 9 March 2007, Mr. Clay recorded the Quitclaim Deed on the property executed by Ms. Kinghorn. Mr. Clay then paid off the balance of the loan. Mr. Clay later sold the property to BRP.

On 29 May 2007, Ms. Kinghorn filed a claim with Fremont County alleging an invalid transfer, fraud, breach of the covenant of good faith and fair dealing, and the existence of a constructive trust. Following various motions from the parties, the Bank filed a Motion for Summary Judgment 22 February 2008. The motion came up for hearing on 1 April 2008. Both parties presented argument and the motion was taken under advisement at that time.

After considering the Court's file, pleadings, depositions, admissions, affidavits, and the argument of counsel, the Court renders the following opinion.

## **II. STANDARD OF REVIEW**

Rule 56(c), Idaho Rules of Civil Procedure, provides that "summary judgment shall be granted forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *DBSI/TRI V v. Bender*, 130 Idaho 796, 801, 948 P.2d 151, 156 (1997) (citing *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 234, 912 P.2d 119, 121 (1996)).

When assessing the motion for summary judgment, all controverted facts are to be

liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *Litz v. Robinson*, 131 Idaho 282, 283, 955 P.2d 113, 114 (Ct.App.1998) citing *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991) and *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). If reasonable people could reach different conclusions based on the evidence, the motion must be denied. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990).

The nonmoving party “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided..., must set forth specific facts showing that there is a genuine issue for trial.” I.R.C.P. 56(e). In attempting to establish such facts, “a mere scintilla of evidence or only slight doubt as to the facts” is insufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In other words, “the party opposing the motion must present more than a conclusory assertion that an issue of fact exists.” *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999).

### **III. ANALYSIS**

#### **1. Slander of Title**

Plaintiff argues that the Bank slandered the title to the property by causing a false Deed of Trust to be recorded and by adding Clay’s name to the Deed of Trust and Deed of Reconveyance.



In order to maintain a claim of slander of title, Plaintiff must show “(1) uttering or publishing slanderous statements; (2) when the statements [are] false; (3) with malice; and (4) resulting in special damages.” *Weaver v. Stafford* 8 P.3d 1234, 1244 (Idaho 2000).

Plaintiff alleges that the Bank recorded a false Deed of Trust when it listed both Clay and Plaintiff as grantors. However, Plaintiff has signed a Quit Claim Deed from Clay to Plaintiff for the Property. Also, Clay was a cosigner on a loan with Plaintiff which used the Property as collateral, and Plaintiff signed a Loan Guarantee Agreement granting Clay a security interest in the Property.

Plaintiff’s claim that the Deed of Trust falsely granted Clay a security interest must fail. The documents Plaintiff signed which were prepared by Clay’s attorney grant Clay an interest in the property; the Bank’s Deed of Trust only reflects the interest Clay may have obtained through those documents.

Nor has Plaintiff shown malice on the part of the Bank. The Idaho Supreme Court has defined malice “as knowledge of falsity or reckless disregard of truth. Its essence is a knowing state of mind on the part of the publisher.” *Bandelin v. Pietsch*, 563, P.2d 395, 400 (Idaho 1977). Plaintiff admits that the Bank’s agents did not prepare Clay’s loan documents and that the Bank or its agents may not have been aware of Plaintiff’s dealings with Clay.

Plaintiff signed several documents that appear to give Clay a security interest in the Property. The Bank reasonably relied on these documents when it placed Clay’s name on the Deed of Trust. Relying on those documents does not demonstrate malice.

Plaintiff argues that the Deed of Reconveyance improperly granted Clay the Property after he paid off the balance of the loan, a result in part of the Bank’s Deed of Trust. The Bank argues that the Deed of Reconveyance did not grant Clay any interest, because it was to

“GRANT and RECONVEY unto the parties LEGALLY ENTITLED THERETO, without warranty, all the estate and interest derived to the trustee under said deed of trust, in the lands therein described.”

The Deed of Reconveyance did not grant any interest to Clay that was not already present. As stated previously, any interest Clay had in the Property was created by documents Plaintiff signed which were created by Clay’s attorneys, not the bank. The Deed of Reconveyance did not cause any damages to Plaintiff.

Plaintiff has not established any of the elements of a claim of slander of title against the Bank.

## **2. Covenant of Good Faith and Fair Dealing**

Plaintiff argues that the Bank violated the covenant of good faith and fair dealing by failing to provide her with notice of missed payments though the bank notified Clay.

The covenant of good faith and fair dealing is a covenant implied in contracts. *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 748 (Idaho 1989). The implied covenant “only requires the parties to perform in good faith the obligations contained in their agreement.” *Idaho First National Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841, 864 (Idaho 1992).

Here, Plaintiff argues that the Bank had a responsibility to notify her if her payments were late. However, the terms of the Deed of Trust did not require the Bank to notify Plaintiff, but to notify one of the grantors of the deed, and that the notice was to be given through first class mail. The Bank sent notice by first class mail to the addresses listed by Plaintiff and Clay in the Deed of Trust, beyond what the Deed of Trust required. Plaintiff had changed addresses by this point, but the bank complied with the notice requirements of the Deed of Trust.

Also, Plaintiff argues that because Fereday had made payments on Plaintiff's behalf, she should have received notice of late payments. "The implied covenant of good faith and fair dealing arises only regarding terms agreed to by the parties." *Taylor v. Browning*, 927 P.2d 873, 881 (Idaho 1996). The Deed of Trust did not require the Bank to notify Fereday—who was not mentioned in the loan—of missed payments.

Additionally, Plaintiff argues that the Bank violated the covenant of good faith and fair dealing by notifying Clay of the missed payments. The Bank sent notifications by first class mail to both grantors of the Deed of Trust, and later called Clay to inform him that the payments were past due. The Bank could not have violated the covenant of good faith and fair dealing because it complied with the notice requirements of the Deed of Trust. Calling Clay and notifying both grantors does not violate the contract; the Bank cannot violate the covenant of good faith and fair dealing by doing more than is required.

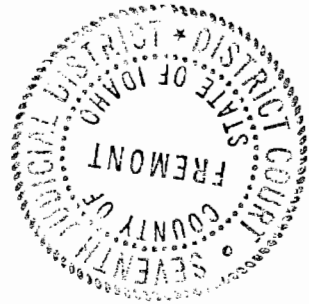
For Plaintiff to defeat a motion for summary judgment she must show that there remains some genuine issue of material fact. Here, there is no issue of material fact concerning Plaintiff's claims against the Bank.


IV.  
**CONCLUSION**

Therefore, it is hereby ordered that Defendant The Bank of Commerce's Motion for Summary Judgment is GRANTED.

**IT IS SO ORDERED.**

Dated this 14 day of May, 2008.



  
\_\_\_\_\_  
Jon J. Shindurling  
District Judge

## CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of May, 2008, I served a true and correct copy of the foregoing OPINION, DECISION, AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

### Attorneys for Plaintiff

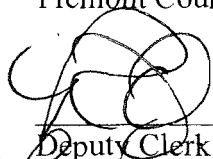
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### Attorneys for Defendant

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490 Memorial Drive  
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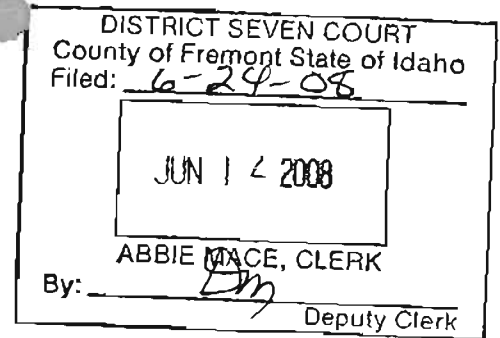
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Clerk of the District Court  
Fremont County, Idaho

by

 is chambers at  
Deputy Clerk  
Bonneville County

Douglas R. Nelson  
Brian T. Tucker  
ANDERSON NELSON HALL SMITH, P.A.  
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Idaho State Bar Number 1580 & 5236

Attorneys for The Bank of Commerce



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

vs.

KELLY N. CLAY, an individual, BRP,  
INCORPORATED, an Idaho corporation,  
and THE BANK OF COMMERCE, an  
Idaho Banking corporation,

Defendants.

Case No. CV-07-0306

**ORDER AND JUDGMENT FOR  
POST-JUDGMENT ATTORNEY'S  
FEES AND COSTS**

The Motion for Attorney's Fees and Costs was filed on June <sup>12</sup>~~24~~, 2008 along with the Affidavit of Brian T. Tucker in support of Request for Attorney's Fees and Costs and the Memorandum of Attorney's Fees and Costs. The Plaintiff having not filed an objection and it appearing from the Motion, Affidavit, and Memorandum that the requested fees and costs are reasonable and necessarily expended, IT IS HEREBY ORDERED that the Defendant The Bank of Commerce be awarded post-judgment attorney's fees and costs in the amount of \$ 19,269.<sup>50</sup> and that the Defendant The Bank of Commerce have a judgment for its post-judgment attorney's fees and costs in the amount of \$ 19,269.<sup>50</sup>

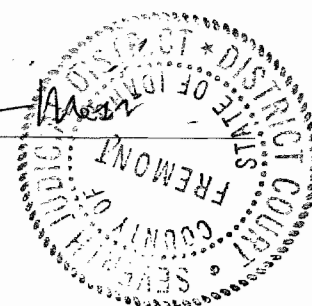
ORDER AND JUDGMENT FOR POST-JUDGMENT ATTORNEY'S FEES AND COSTS

- 1

DATED this 24 day of June, 2008.

JUDGE

*Brent J. [Signature]*



### CLERK'S CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 25 day of June, 2008, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

E. W. Pike  
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CLERK OF THE COURT

By: *Leborah Mae*  
Deputy Clerk

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E.W. Pike  
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| DISTRICT SEVEN COURT<br>County of Fremont State of Idaho |   |
| Filed:   | <div style="border: 1px solid black; padding: 5px; text-align: center;">JUL 11 2008</div>           |
| ABBIE MACE, CLERK  |   |
| By:  | <br>Deputy Clerk |

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff/Appellant,

vs.

THE BANK OF COMMERCE, an Idaho  
Banking corporation,

Defendant/Respondent.

Case No. CV-07-306

**NOTICE OF APPEAL**

T

**TO: Defendant THE BANK OF COMMERCE, and attorney BRIAN T. TUCKER and  
DOUGLAS R. NELSON, and THE CLERK OF THE ABOVE ENTITLED  
COURT:**

NOTICE IS HEREBY GIVEN, pursuant to Rule 11 of the Idaho Appellate Rules:


1. The above named Appellant appeals against the above named Respondent to the Idaho Supreme Court from the Opinion, Decision, and Order granting Defendant Summary Judgment on May 30, 2008, District Judge Jon J. Shindurling presiding.

2. The party has a right to appeal to the Idaho Supreme Court based on the above-mentioned order which was final as to Defendant The Bank of Commerce, and pursuant to IAR 11(a)(1).



3. The preliminary issues on appeal are:
- a. Did the record before the District Court contain conflicting inferences?
  - b. Could reasonable persons reach differing conclusions from the evidence presented?
  - c. Did the District Court fail to construe disputed facts in favor of the nonmoving party?
  - d. Did the District Court commit errors of law and fact in granting partial summary judgment to respondent?
  - e. Did the District Court fail to support its judgment with findings of fact and conclusions of law?
4. A reporter's transcript is not requested.
5. We are not aware of any documents which need to be included in the Clerk's record in addition to those automatically included under I.A.R. 28.
6. I certify:
- a. A copy of this Notice of Appeal has been served on the reporter.
  - b. We have not been notified of any fees for additional documents in the Clerk's record.
  - c. That the appellate filing fee has been paid.
  - d. That the service has been made upon all parties required to be served pursuant to Rule 20.

Dated this 11 day of July, 2008.

  
\_\_\_\_\_  
Alan Johnston  
E. W. Pike & Associates, PA  
Attorneys for Plaintiff

## CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing, to the following, by the indicated method on this 11 day of July, 2008, by U.S. Mail, hand delivery or facsimile, with the necessary postage affixed thereto.

Mark R. Fuller  
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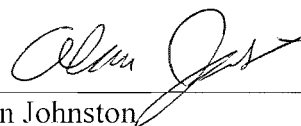
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Nancy Marlow  
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☐ Facsimile  
☐ Hand Delivery



Alan Johnston  
E.W. Pike & Associates, P.A.  
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP,  
INCORPORATED, an Idaho corporation,  
and THE BANK OF COMMERCE, an  
Idaho Banking corporation,

Defendants.

Case No. CV-07-0306

ABIE MACE, CLERK

By: *DM* Deputy Clerk

OPINION, DECISION, AND ORDER  
ON PARTIES' MOTIONS FOR  
SUMMARY JUDGMENT

FILED IN CHAMBERS  
AT IDAHO FALLS  
BONNEVILLE COUNTY  
HONORABLE JON J. SHINDURLING  
DATE Aug 22, 2008  
TIME 3:51 pm  
DEPUTY CLERK Walter

I.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2000 Krystal Kinghorn purchased Lot 15, Block 6, Buffalo River Estates Division No. 2, Fremont County. The property was conveyed to Ms. Kinghorn and her husband. In August 2005 Ms. Kinghorn's husband executed a quitclaim deed in favor of Ms. Kinghorn on the property. In the Fall of 2005 Ms. Kinghorn and her husband divorced.

In November 2005 Ms. Kinghorn approached The Bank of Commerce ("the Bank") and applied for a \$20,000 loan. Ms. Kinghorn agreed to pledge the property and a mobile home on the property as security for the loan. The Bank required Ms. Kinghorn to obtain a co-signor for the loan and a Deed of Trust on the property. Kelly Clay agreed to cosign the loan so long as Kinghorn signed a Deed of Trust and a Quitclaim Deed. In December 2005, Ms. Kinghorn executed the bank loan documents, including the note, the Bank's Deed of Trust, Truth-in-Lending Disclosures, Settlement Statement, Servicing Disclosure Statement, Agreement to

Provide Insurance, Errors and Omissions Agreement, and Consumer Account Agreement. Nolan Lee, a representative of the bank, notarized Ms. Kinghorn's signature on the documents.

Ms. Kinghorn was able to make payments on the loan for the first year of the loan period, but on March 2, 2007, Mr. Clay received written notice that Ms. Kinghorn had missed two payments on the loan. On March 8, 2007, Mr. Clay made two payments on the loan. On March 9, 2007, Mr. Clay recorded the Quitclaim Deed on the property executed by Ms. Kinghorn. Mr. Clay then paid off the balance of the loan. Soon thereafter, Clay contacted Doyle Beck about buying the land. Mr. Beck is the owner of BRP and is a personal friend of Mr. Clay's. Mr. Beck agreed to buy the property for \$30,000.

On 29 May 2007, Plaintiff filed a claim with Fremont County alleging an invalid transfer, fraud, breach of the covenant of good faith and fair dealing, ambiguous contract, and the existence of a constructive trust. Following various motions from the parties, Plaintiff filed a Motion for Partial Summary Judgment on January 25, 2008. BRP filed a Cross-Motion for Summary Judgment on February 7, 2008. Clay filed a Motion for Summary Judgment on March 4, 2008. The motion came up for hearing on April 1, 2008. All parties presented argument and the motions were taken under advisement at that time.

After considering the Court's file, pleadings, depositions, admissions, affidavits, and the argument of counsel, the Court renders the following opinion.

## **II. STANDARD OF REVIEW**

Rule 56(c), Idaho Rules of Civil Procedure, provides that "summary judgment shall be granted forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law.” *DBSI/TRI V v. Bender*, 130 Idaho 796, 801, 948 P.2d 151, 156 (1997) (citing *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 234, 912 P.2d 119, 121 (1996)).

When assessing the motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *Litz v. Robinson*, 131 Idaho 282, 283, 955 P.2d 113, 114 (Ct.App.1998) citing *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991) and *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). If reasonable people could reach different conclusions based on the evidence, the motion must be denied. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990).

The nonmoving party “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided..., must set forth specific facts showing that there is a genuine issue for trial.” I.R.C.P. 56(e). In attempting to establish such facts, “a mere scintilla of evidence or only slight doubt as to the facts” is insufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In other words, “the party opposing the motion must present more than a conclusory assertion that an issue of fact exists.” *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999).

### **III. ANALYSIS**

Plaintiff seeks summary judgment arguing that the quit claim deed was a mortgage subject to Plaintiff’s right of redemption and that Defendant BRP was not a bona fide purchaser

of the property. Defendants both seek summary judgment arguing that the quit claim deed was not a mortgage subject to a right of redemption and that BRP was a bona fide purchaser.

Defendant Clay also seeks summary judgment on Plaintiff's claims for fraud, constructive trust, breach of the covenant of good faith and fair dealing, and ambiguous contract, arguing that Plaintiff has failed to meet her burden of evidence or argument on any of the claims.

#### **A. The Quitclaim Deed Was a Mortgage**

Plaintiff argues that both parties intended the quitclaim deed to act as a mortgage and to serve as security for the repayment of the loan.

Defendants urge the court to analyze the quitclaim deed using the factors courts often consider when determining whether or not to construe an absolute deed as a mortgage:

- (a) the existence of a debt to be secured,
- (b) the satisfaction or survival of the debt,
- (c) the previous negotiations of the parties,
- (d) the inadequacy of the price paid,
- (e) the financial condition of the grantor, and
- (f) the intention of the parties.

*Hogg v. Wolske*, 142 Idaho 549, 555 (2006)(quoting *Dickens v. Heston*, 21 P.2d 905, 908 (Idaho 1933)).

Defendants argue that no mortgage could exist, because the quitclaim deed did not establish a debt owed by Kinghorn to Clay. In *Dickens*, the Idaho Supreme Court said, "The controlling test to be applied in determining whether a given instrument is a mortgage is whether at the time of the execution of the deed the grantor sustains the relation of debtor to the grantee."

21 P.2d at 908. Here, Defendants argue that the debt was only between Plaintiff and the bank, and that Plaintiff owed no debt to Clay.

Plaintiff argues that when Clay began making payments, Plaintiff incurred a duty to repay Clay for the payments made, satisfying the *Dickens* requirement of the existence of a debt.

In *Hogg* the parties signed a deed and contract to reconvey the real property. The purchaser paid the full purchase price and received the deed and possession of the land. The appellant argued that the contract to reconvey constituted a mortgage. The court considered the six factors from *Dickens* only after considering I.C. § 45-904 and determining that the contract to reconvey along with a transfer of a deed did not “necessarily show an intent that the deed was given as security for an obligation.” *Hogg*, 142 Idaho at 554.

It is not necessary to apply the *Dickens* criteria in a situation where the transaction fits the statutory requirements of I.C. § 45-904. The *Dickens* opinion, and most of the cases Defendants rely upon, was issued well before 1967, when the legislature adopted I.C. § 45-904.

Here, unlike in *Hogg*, the transaction does “show an intent that the deed was given as security for an obligation.” Clay acknowledged in his deposition that he had the quit claim document drafted “for protection” so that he would not be left owing money and to protect his credit after cosigning Kinghorn’s loan from the bank. The Idaho Supreme Court has said, speaking of a transaction under I.C. § 45-904, “It is unnecessary to labor the proposition that these instruments were mortgages and not quitclaim deeds and assignments as they purport to be, since on their face they carry the label of security transactions. An instrument may in form be a deed or an assignment, but, if the intent is to use the property as security, it will be a mortgage.” *Rush v. Anestos*, 104 Idaho 630, 634-35 (1983)(quoting *Kendrick v. Davis*, 452 P.2d 222

(Wash.1969). In *Rush* the court held “a security instrument, however it is called, is a mortgage whenever real property is encumbered as security for a debt or liability.” 104 Idaho at 634.

Here, the parties included the quitclaim deed to encumber the property as security for Clay’s liability in cosigning the loan agreement. Both the loan guarantee agreement and the deed of trust refer to the quit claim deed as Clay’s security. Under I.C. § 45-904 the quitclaim deed is a mortgage, and no question of fact exists.

### **B. Right of Redemption**

Because the quitclaim deed was a mortgage, Plaintiff was entitled to a right of redemption under I.C. § 11-310: “When the estate is less than a leasehold of two (2) years’ unexpired term, the sale is absolute. In all other cases the property is subject to redemption.”

I.C. § 11-402 provides that the judgment debtor may exercise the right of redemption on a parcel of land less than 20 acres within 6 months of the time the property is sold.

Clay failed to honor Plaintiff’s right of redemption. Clay has presented no argument or evidence otherwise.

### **C. Invalid Transfer**

Defendants argue that Plaintiff’s right of redemption does not apply because BRP was a bona fide purchaser. A bona fide purchaser is one who acquires a title “in good faith, and for a valuable consideration” I.C. § 55-606. “Where a fiduciary wrongfully transfers to a third person property which he holds as fiduciary, the third person is chargeable as constructive trustee of the property unless he is a bona fide purchaser.” *Fenton v. King Hill Irr. Dist.*, 67 Idaho 456, 466-67 (1947)(quoting 3 SCOTT ON TRUSTS, § 506, p. 2429).

Plaintiff claims BRP’s purchase of the land from Clay is an invalid transfer, arguing BRP was not a bona fide purchaser of the property because BRP was on inquiry notice of a potential



defect. Mark Fuller drafted the quitclaim deed for Clay and was aware of its existence. Mr. Fuller had also represented BRP and is currently BRP's registered agent. Plaintiff argues that Mr. Fuller acted as BRP's agent at the time of the purchase and that his knowledge of the quitclaim deed is imputed to BRP.

Courts have said, "knowledge acquired by an agent during the course of the agency relationship...is imputed to the principal; and notice to an agent constitutes notice to the principal." *Mason v. Tucker and Associates*, 125 Idaho 429, 434 (Ct. App. 1994). Defendants argue that Mr. Fuller did not act as BRP's agent in this transaction because BRP did not consult him. Defendants also argue that Mr. Fuller's status as a registered agent does not create a true agency relationship.

In order for Mr. Fuller's knowledge of the quitclaim deed to be imputed to BRP, he must have acquired that knowledge "in the course of the agency relationship." Mr. Fuller clearly had knowledge of the quitclaim deed, as he drafted it for Clay. Plaintiff has not presented testimony or affidavit that Mr. Fuller acted as BRP's attorney for this transaction. However, Mr. Fuller had previously represented BRP before this transaction and has billed BRP for legal advice about this lawsuit. Mr. Fuller's subsequent representation of BRP on this issue does not of itself retroactively impute his knowledge to BRP. The general rule in this situation is that "a purchaser of real property is chargeable with notice to, or knowledge of, his or her attorney in respect of matters affecting title received or obtained by the attorney while acting for the purchaser in connection with the acquisition of the property." 7A C.J.S. *Attorney & Client* § 226 (2004). Mr. Fuller was clearly not acting for BRP in connection with this acquisition in June 2007 when he learned of the quitclaim deed when he drafted it in 2005.

Plaintiff also argues that Mr. Fuller's knowledge is imputed to BRP because Mr. Fuller is BRP's registered agent. The Idaho Business Corporation Act requires each corporation to keep a registered agent in the state. I.C. § 30-1-501. A corporation's registered agent "is the corporation's agent for service of process, notice or demand required or permitted by law to be served on the corporation." I.C. § 30-1-504(1). Idaho law requires specific duties of a registered agent:

The *only* duties under this chapter of a registered agent that has complied with this chapter are:

- (1) To forward to the represented entity at the address most recently supplied to the agent by the entity any process, notice or demand that is served on the agent;
- (2) To provide the notices required by this chapter to the entity at the address most recently supplied to the agent by the entity;
- (3) If the agent is a noncommercial registered agent, to keep current the information required by section 30-405(1), Idaho Code, in the most recent registered agent filing for the entity;
- (4) If the agent is a commercial registered agent, to keep current the information listed for it under section 30-406(1), Idaho Code; and
- (5) To have an individual available during normal business hours at the registered agent's street address to accept service of process and other notices and documents.

I.C. 30-414 (emphasis added).

Employment as a registered agent alone is not sufficient to establish a general agency.

Mr. Fuller's knowledge of the quitclaim deed was not imputed to BRP at the time of the purchase.

Plaintiff also argues that BRP is not a bona fide purchaser because Mr. Beck knew that Plaintiff had a claim to the property. Mr. Beck, as an officer of BRP, is an agent for the corporation in every sense. In his deposition, Mr. Beck stated that he had never heard of Ms. Kinghorn before this lawsuit, but that he knew Mr. Clay had acquired the property because he had cosigned on a loan that had defaulted. He said Mr. Clay told him he had had the property for

six months or a year. He also stated that though he had been in the area of the property before purchasing it, he had been prevented from examining it because the road leading to the property had not been plowed.

In Mr. Clay's deposition he stated that he called Mr. Beck two or three weeks after recording the quitclaim deed, that he told Mr. Beck that he had executed a quitclaim deed, and that he had received the property because Plaintiff had signed a loan guarantee agreement with him and she had defaulted on the loan. Both men said they consider the other a personal friend.

The Idaho Supreme Court has said "that one cannot be a good faith purchaser or encumbrancer when a reasonable investigation of the property would have revealed the existence of the conflicting claim in question." *Langroise v. Becker*, 96 Idaho 218, 221 (1974).

Defendants argue that a reasonable investigation occurs where the purchaser conducts a search of the record to see if there are any conflicting claims or liens on the property, citing *Large v. Cafferty Realty Inc.*, 123 Idaho 676, 680 (1993). However, *Large* states that a search of the record satisfies I.C. § 55-811, but does not shield purchasers from other claims. I.C. § 55-811 provides that "every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers." The *Large* court reversed the trial court's decision to grant the subsequent purchaser's motion for summary judgment because the plaintiff's claims in that case did "not implicate the constructive notice provisions of I.C. § 55-811, and the trial court should not have granted summary judgment on this basis." 123 Idaho at 680. Here, as in *Large*, Plaintiff is not claiming constructive notice because of I.C. § 55-811, but rather actual notice because of Mr. Beck's conversations and relationship with Mr. Clay.

Mr. Beck and Mr. Clay have slightly differing accounts of the conversations leading up to the sale, but both said that Mr. Beck was aware that Mr. Clay received the property through a quitclaim deed he held as a security for cosigning a loan. Mr. Beck said that he did not investigate the property but that he could have gone to the property using equipment. Mr. Beck does not appear to have done any investigation into the quitclaim deed and relied solely on Mr. Clay's assertions and the tax assessment.

Whether Mr. Beck's efforts constituted a reasonable investigation is a question that reasonable people could disagree on. Neither side has presented sufficient testimony to show that there is no genuine issue of material fact as to BRP's status as a bona fide purchaser.

#### **D. Fraud**

Clay seeks summary judgment on Plaintiff's claim of fraud, arguing that Plaintiff has not presented clear and convincing evidence that Clay had no intention of following through on the representations he made to Plaintiff.

Generally, an action for fraud "will not lie for statements of future events." *Mitchell v. Barendregt*, 120 Idaho 837, 843 (Ct.App.1991). In order for a plaintiff to prevail in a claim of fraud, they are required to prove by clear and convincing evidence that the defendant had no intention of following through on their representations. *Large*, 123 Idaho 680. This clear and convincing standard does not—as Clay argues—apply to summary judgment analysis, but courts are to apply the usual summary judgment standard. *Id.* However, here, Plaintiff has not presented any evidence or testimony supporting the claim that Mr. Clay had no intention of following through on his representations.

There is no genuine issue of material fact for Plaintiff's claim of fraud or misrepresentation against Clay.

### **E. Covenant of Good Faith and Fair Dealing**

Clay seeks summary judgment on Plaintiff's claim of breach of the covenant for good faith and fair dealing, arguing that none of the breaches alleged by Plaintiff are related to terms agreed upon by the parties.

The covenant of good faith and fair dealing is a covenant implied in contracts. *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 748 (Idaho 1989). The implied covenant "only requires the parties to perform in good faith the obligations contained in their agreement." *Idaho First National Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841, 864 (Idaho 1992).

Plaintiff argues that Clay breached the covenant by not informing her that he received communications from the bank, by making payments to the bank, and by selling the property without allowing Plaintiff to exercise her right of redemption.

Clay argues that he had no obligation under the loan guarantee agreement to notify Plaintiff of the communications, to not make payments on her behalf, or to allow Plaintiff to exercise her right of redemption.

Plaintiff has offered no evidence or testimony that the loan guarantee agreement required Clay to notify Kinghorn of any correspondence from the bank.

Additionally, the loan guarantee agreement *does* require Clay to make payments to the bank when Kinghorn failed to do so; determining that making the payments as provided for in the loan guarantee agreement is a breach of the covenant of good faith and fair dealing would result in an incongruous conclusion.

As explained above, the quitclaim deed was a mortgage under § 45-904, with an accompanying right of redemption under I.C. §§ 11-310, 402. When Clay sold the property without allowing Plaintiff to exercise her right of redemption, he breached the contract and the

covenant of good faith and fair dealing. However, in Idaho the covenant of good faith and fair dealing is only enforceable in contract, not in tort. *Metcalf* 778 P.2d at 748 (citing *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (1988)). The breach of the covenant does not provide for any additional remedy where the court has already determined that the breach of contract occurred.

#### **F. Constructive Trust**

Clay seeks summary judgment of Plaintiff's claim of constructive trust, arguing that there can be no constructive trust where Clay does not currently possess the property. Plaintiff argues that the court should impose a constructive trust because Clay attained the title to the property through fraud or under circumstances rendering it unconscionable for Clay to retain title.

As explained above, Plaintiff has established that the quitclaim deed was a mortgage and that Clay improperly denied Plaintiff the opportunity to exercise her right of redemption. This decision is predicated on Idaho's statutory scheme. Having found relief in law, Plaintiff may not also receive relief in equity.

#### **G. Ambiguous Contract**

Clay seeks summary judgment of Plaintiff's claim of ambiguous contract, arguing that the word *required* has a clearly settled legal meaning, and therefore the contract is not ambiguous.

Plaintiff argues that the use of the word *required* in the loan guarantee agreement is not defined and is reasonably subject to conflicting interpretation. The agreement states, "in the event Clay is required to make any payments whatsoever to the Bank of Commerce-Northgate that Clay may immediately record a Quit Claim Deed to the property."

“To determine whether or not a covenant is ambiguous, the court must view the agreement as a whole.” *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829 (2003)(citing *Brown v. Perkins*, 129 Idaho 189, 193 (1996)). The loan guarantee agreement uses the word *requires* several times, none of which seem to use it in any but its normal, everyday meaning. The loan guarantee agreement also incorporates by reference the loan for \$20,470 from the Bank of Commerce. According to the loan from the Bank of Commerce, as guarantor of the loan, Clay was obligated to pay the balance of the loan. After Plaintiff failed to make two payments, Clay received a letter from the bank informing him that he was required to make the loan current.

The use of the word *requires* in any part of the loan guarantee agreement is not ambiguous, nor is the document itself. There is no genuine issue of material fact on Plaintiff’s claim of ambiguous contract.

#### **IV. CONCLUSION**

Plaintiff’s Motion for Partial Summary Judgment is DENIED.

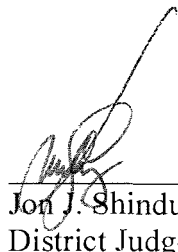
Defendant BRP’s Cross-Motion for Summary Judgment is DENIED.

Defendant Clay’s Motion for Summary Judgment is DENIED in part and GRANTED in part.

Clay’s Motion for Summary Judgment on Plaintiff’s claims for Fraud and Ambiguous Contract are GRANTED.

**IT IS SO ORDERED.**

Dated this 22 day of August, 2008.

  
\_\_\_\_\_  
Jon J. Shindurling  
District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22 day of August, 2008, I served a true and correct copy of the foregoing OPINION, DECISION, AND ORDER ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

**Attorneys for Plaintiff**

E.W. Pike, Esq.  
Alan Johnston, Esq.  
E. W. Pike & Associates  
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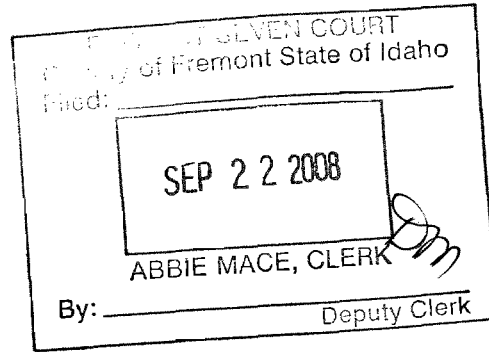
\_\_\_\_\_  
Clerk of the District Court  
Fremont County, Idaho

by

Quatter  
\_\_\_\_\_  
Deputy Clerk



E.W. Pike (ISB 650)  
 Erika Lessing (ISB 6797)  
 E. W. PIKE & ASSOCIATES, P.A.  
 151 N. Ridge Ave., Suite 210  
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 Idaho Falls, ID 83403-2949  
 Telephone: 208/528-6444  
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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT**

KRYSTAL M. KINGHORN, f/k/a  
 KRYSTAL M. BARRETT,

Plaintiff,

vs.

KELLY N. CLAY, an individual,  
 BRP, INCORPORATED, an Idaho  
 corporation, and THE BANK OF  
 COMMERCE, an Idaho Banking  
 corporation,

Defendants.

Case No. CV-07-306

**AMENDMENT TO THE AMENDED  
 COMPLAINT**

Plaintiff Krystal M. Kinghorn f/k/a Krystal M. Barrett ("Krystal"), through her attorneys,  
 amends her Amended Complaint by adding the following language:

**WASTE**

1. Plaintiff realleges all allegations in the Amended Complaint, and incorporates the same as reference.
2. Since the time BRP purchased the property from Clay, BRP has had possession of the property.
3. BRP has failed to maintain the land, or take action to prevent waste on the

property.

4. As a direct and proximate result of BRP's failure to act, the property has been damaged, including, but not limited to the snow shed over the trailer which was damaged as a result of snow not being shoveled off it in the winter.

5. Plaintiff has suffered damages as a result of said waste in an amount to be proven at trial.

WHEREFORE, Krystal adds to her prayer for relief as follows:

1. For damages to the property as a result of Defendant BRP's waste.

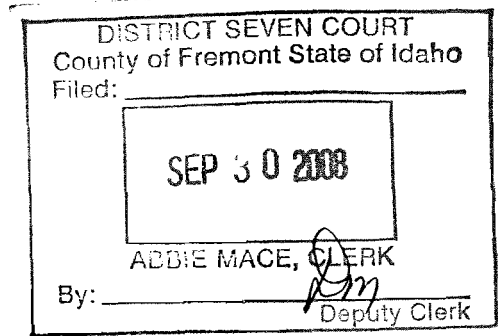
DATED this \_\_\_\_\_ day of September, 2008.

---

Alan Johnston  
E.W. Pike & Associates, P.A.  
Attorneys for Plaintiffs

Bryan D. Smith, Esq. – ISB #4411  
**SMITH, DRISCOLL & ASSOCIATES, PLLC**  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, Idaho 83405  
Telephone: (208) 524-0731  
Facsimile: (208) 529-4166

Attorneys for Defendant



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP  
INCORPORATED, an Idaho corporation, and  
THE BANK OF COMMERCE, an Idaho  
Banking corporation,

Defendants.

Case No. CV-07-0306

**MOTION FOR RECONSIDERATION OR  
ALTERNATIVELY SUMMARY  
JUDGMENT**

COMES NOW the defendant, Kelly N. Clay, by and through his counsel of record, Bryan D. Smith, Esq., of the firm Smith, Driscoll & Associates, PLLC, and moves the Court pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B) for an order of reconsideration of this Court order dated August 22, 2008. Alternatively, the defendant, Kelly N. Clay, moves pursuant to I.R.C.P. 56 for an order granting summary judgment in favor of defendant, Kelly N. Clay.

This motion is made on the grounds that there is no genuine issue of material fact which must be decided and that defendant, Kelly N. Clay, is entitled to a judgment in the above-entitled action as a matter of law.

This motion is based upon this Motion, the Notice of Hearing, the Brief in Support of Motion for Reconsideration or Alternatively Summary Judgment, the Affidavit of Doyle Beck, the Affidavit of Kelly N. Clay and upon the court files and records herein.

Defendant requests oral argument on said motion.

DATED this 2<sup>nd</sup> day of October, 2008.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

Bryan D. Smith  
Attorneys for Defendant

# CERTIFICATE OF SERVICE

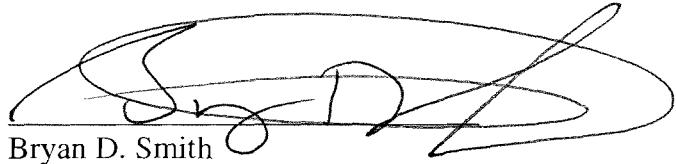
I HEREBY CERTIFY that on this 2<sup>nd</sup> day of October, 2008, I caused a true and correct copy of the foregoing **MOTION FOR RECONSIDERATION OR ALTERNATIVELY SUMMARY JUDGMENT** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

E.W. Pike, Esq.  
Alan Johnston, Esq.  
E.W. Pike & Associates  
151 N. Ridge Ave., Suite 210  
Idaho Falls, ID 83403-2949

[ ☒ ] U. S. Mail  
[ ☐ ] Fax  
[ ☐ ] Overnight Delivery  
[ ☐ ] Hand Delivery

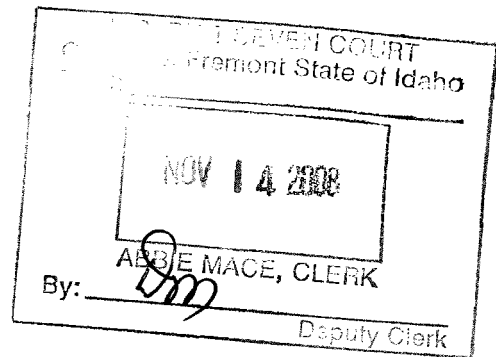
Bradley J. Dixon, Esq.  
Samia E. McCall, Esq.  
Stoel Rives, LLP  
101 South Capitol Boulevard,  
Suite 1900  
Boise, ID 83702

[ ☒ ] U. S. Mail  
[ ☐ ] Fax  
[ ☐ ] Overnight Delivery  
[ ☐ ] Hand Delivery

  
Bryan D. Smith

Bradley J. Dixon, ISB No. 6167  
Email: [bjdixon@stoel.com](mailto:bjdixon@stoel.com)  
Jennifer M. Reinhardt, ISB No. 7432  
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STOEL RIVES LLP  
101 S. Capitol Boulevard, Suite 1900  
Boise, Idaho 83702  
Telephone: (208) 389-9000  
Fax Number: (208) 389-9040

Attorneys for Defendant BRP, Incorporated



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP,  
INCORPORATED, an Idaho corporation,  
and THE BANK OF COMMERCE, an  
Idaho Banking corporation,

Defendants.

Case No. CV-07-0306

**BRP, INCORPORATED'S ANSWER TO  
PLAINTIFF'S AMENDMENT TO THE  
AMENDED COMPLAINT**

COMES NOW Defendant BRP, Incorporated ("BRP" or "Defendant"), by and through  
its undersigned counsel and hereby answers Plaintiff's Amendment to the Amended Complaint  
filed by Plaintiff Krystal M. Kinghorn f/k/a Krystal M. Barrett ("Plaintiff"), as follows:

DOCUMENT

ORIGINAL

Defendant hereby denies each and every allegation set forth in Plaintiff's Amendment to the Amended Complaint not hereinafter expressly admitted.

### **WASTE**

1. In response to paragraph 1, BRP incorporates its responses to the allegations as set forth in BRP's Answer to Plaintiff's Amended Complaint.
2. In response to paragraph 2, BRP admits the allegations contained therein.
3. In response to paragraphs 3-5, BRP denies each and every allegation contained therein.

### **AFFIRMATIVE AND OTHER DEFENSES**

BRP has not yet had a reasonable opportunity to complete discovery of Plaintiff's claim for waste. To the extent additional facts and circumstances may hereafter be discovered which may support additional defenses, BRP reserves the right to amend its Answer to allege additional defenses when discovered.

#### **FIRST DEFENSE**

Plaintiff's Amendment to the Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Idaho Rule of Civil Procedure 12(b).

#### **SECOND DEFENSE**

Plaintiff's damages, if any, were the result of her actions and failures to act.

#### **THIRD DEFENSE**

Plaintiff failed to properly mitigate damages.

#### **FOURTH DEFENSE**

Plaintiff's claim for waste is barred in whole or in part by the doctrines of estoppel, waiver, laches, ratification, acquiescence, consent, accord and satisfaction and release.

#### **FIFTH DEFENSE**

Plaintiff's damages, if any, were caused by and were a direct result of the actions of the Plaintiff and, accordingly, the Plaintiff cannot recover for the same.

#### **SIXTH DEFENSE**

Damages sustained by the Plaintiff, if any, are the result of independent, intervening, and/or superseding causes, including, but not limited to, acts and omissions of the Plaintiff or third parties.

#### **SEVENTH DEFENSE**

No act or omission of BRP was a proximate cause or cause in fact of damages, if any, suffered by the Plaintiff.

#### **ATTORNEY FEES**

BRP requests attorney's fees and costs under applicable law including, but not limited to, Idaho Code § 12-120 and Idaho Code § 12-121.


WHEREFORE, BRP respectfully requests the following relief:

- a. That Plaintiff's Amendment to the Amended Complaint be dismissed with prejudice and without granting any relief requested by Plaintiff;
- b. That BRP be awarded its costs and expenses incurred in defending this claim, including appropriate and reasonable attorneys' fees and costs allowed by applicable law, including, but not limited to, Idaho Code § 12-120 and Idaho Code § 12-121; and
- c. Such other and further relief, at law or in equity as the Court deems warranted and just.



DATED: November <sup>m</sup>13, 2008.

STOEL RIVES LLP



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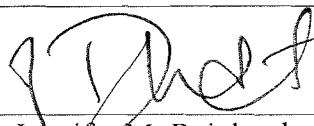
Jennifer M. Reinhardt  
Attorney for Defendant BRP, Incorporated

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of November, 2008, I served a true and correct copy of the foregoing **BRP, INCORPORATED'S ANSWER TO PLAINTIFF'S AMENDMENT TO THE AMENDED COMPLAINT** by the method indicated below, addressed to the following:

|   |  |
|---|--|
| Jon J. Shindurling<br>District Judge<br>Bonneville County District Court<br>605 N. Capital Avenue<br>Idaho Falls, ID 83402  | Via U.S. Mail  |
| E.W. Pike<br>Erika Lessing<br>E.W. PIKE & ASSOCIATES, P.A.<br>151 N. Ridge Ave., Suite 210<br>PO Box 2949<br>Idaho Falls, ID 83403<br>Facsimile: 208-528-6447<br><i>Attorneys for Plaintiff</i>         | <input checked="" type="checkbox"/> Via U.S. Mail<br><input type="checkbox"/> Via Facsimile<br><input type="checkbox"/> Via Overnight Mail<br><input type="checkbox"/> Via Hand Delivery |
| Bryan D. Smith<br>SMITH, DRISCOLL & ASSOCIATES<br>414 Shoup Avenue<br>PO Box 50731<br>Idaho Falls, ID 83405<br>Facsimile: 208-529-4166<br><i>Attorney for Defendant Kelly Clay</i>                      | <input checked="" type="checkbox"/> Via U.S. Mail<br><input type="checkbox"/> Via Facsimile<br><input type="checkbox"/> Via Overnight Mail<br><input type="checkbox"/> Via Hand Delivery |
| Douglas R. Nelson<br>Brian T. Tucker<br>Anderson Nelson Hall Smith, P.A.<br>490 Memorial Drive<br>Post Office Box 51630<br>Idaho Falls, ID 83405<br><i>Attorneys for Defendant The Bank of Commerce</i> | <input checked="" type="checkbox"/> Via U.S. Mail<br><input type="checkbox"/> Via Facsimile<br><input type="checkbox"/> Via Overnight Mail<br><input type="checkbox"/> Via Hand Delivery |

By:

  
Jennifer M. Reinhardt

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP,  
INCORPORATED, an Idaho corporation,  
and THE BANK OF COMMERCE, an  
Idaho Banking corporation,

Defendants.

Case No. CV-07-0306

OPINION, DECISION, AND ORDER  
ON PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
DEFENDANT CLAY'S MOTION TO  
RECONSIDER

FILED IN CHAMBERS  
AT IDAHO FALLS  
BONNEVILLE COUNTY  
HONORABLE JON J. SHINDURLING  
DATE 1/12/2009  
TIME 9:40 AM  
DEPUTY CLERK Sharon Johnston

I.  
FACTUAL AND PROCEDURAL BACKGROUND

In May 2000 Krystal Kinghorn purchased Lot 15, Block 6, Buffalo River Estates Division No. 2, Fremont County. The property was conveyed to Ms. Kinghorn and her husband. In August 2005 Ms. Kinghorn's husband executed a Quitclaim Deed in favor of Ms. Kinghorn on the property. In the Fall of 2005 Ms. Kinghorn and her husband divorced.

In November 2005 Ms. Kinghorn approached The Bank of Commerce ("the Bank") and applied for a \$20,000 loan. Ms. Kinghorn agreed to pledge the property and a mobile home on the property as security for the loan. The Bank required Ms. Kinghorn to obtain a co-signor for the loan and a Deed of Trust on the property. Kelly Clay agreed to co-sign the loan. In December 2005, Ms. Kinghorn executed the bank loan documents, including the note, the Bank's Deed of Trust, Truth-in-Lending Disclosures, Settlement Statement, Servicing Disclosure Statement, Agreement to Provide Insurance, Errors and Omissions Agreement, and Consumer Account

Agreement. Nolan Lee, a representative of the bank, notarized Ms. Kinghorn's signature on the documents.

Ms. Kinghorn was able to make payments on the loan for the first year of the loan period, but on 2 March 2007, Mr. Clay received written notice that Ms. Kinghorn had missed two payments on the loan. On 8 March 2007, Mr. Clay made two payments on the loan. On 9 March 2007, Mr. Clay recorded the Quitclaim Deed on the property executed by Ms. Kinghorn. Mr. Clay then paid off the balance of the loan. Mr. Clay later sold the property to BRP.

On 29 May 2007, Ms. Kinghorn filed a claim with Fremont County alleging an invalid transfer, fraud, breach of the covenant of good faith and fair dealing, and the existence of a constructive trust.

Following various motions from the parties the court granted the Bank's motion for summary judgment and granted in part Plaintiff's motion for partial summary judgment in an August 22, 2008 opinion. The court held that the quitclaim deed was a mortgage, and that Clay violated Plaintiff's right of redemption. The court denied Plaintiff's motion for summary judgment on the issue of invalid transfer, finding that whether BRP was a bona fide purchaser was a question of fact appropriate for the jury.

On October 2, 2008 Defendant Clay filed a motion to reconsider or summary judgment, arguing that Plaintiff had failed to exercise her redemption rights. On October 8, 2008 Plaintiff filed a motion for partial summary judgment on the issue of BRP's status as a bona fide purchaser, supported by new affidavit. On October 22, 2008 Defendant BRP filed a motion for summary judgment seeking a determination that Plaintiff failed to exercise her redemption rights.

On November 3, 2008 the motions came before the court for argument. At the hearing counsel for Defendant Clay took the position that the court had erred in its previous findings and requested that the court reconsider the previous finding that Defendant failed to honor Plaintiff's right of redemption and instead order a foreclosure sale if the court found that BRP was not a bona fide purchaser or to bifurcate the trial if the court found that BRP was a bona fide purchaser. The court allowed time for additional briefing and took the matter under advisement.

After considering the Court's file, pleadings, depositions, admissions, affidavits, and the argument of counsel, the Court renders the following opinion.

## **II. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

### **A. STANDARD OF REVIEW**

Rule 56(c), Idaho Rules of Civil Procedure, provides that "summary judgment shall be granted forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *DBSI/TRI V v. Bender*, 130 Idaho 796, 801, 948 P.2d 151, 156 (1997) (citing *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 234, 912 P.2d 119, 121 (1996)).

When assessing the motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *Litz v. Robinson*, 131 Idaho 282, 283, 955 P.2d 113, 114 (Ct.App.1998) citing *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991) and *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). If reasonable people could reach different conclusions based

on the evidence, the motion must be denied. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990).

The nonmoving party “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided..., must set forth specific facts showing that there is a genuine issue for trial.” I.R.C.P. 56(e). In attempting to establish such facts, “a mere scintilla of evidence or only slight doubt as to the facts” is insufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In other words, “the party opposing the motion must present more than a conclusory assertion that an issue of fact exists.” *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999).

## **B. ANALYSIS**

In the August 22, 2008 opinion and order the court held that there was not sufficient evidence to determine that BRP was not a bona fide purchaser, and that the question was best left to the jury. At the November 3, 2008 hearing the parties agreed that the case was scheduled for a court trial.

Plaintiff argues that BRP is not a bona fide purchaser because it had inquiry notice of Plaintiff’s claim to the property. Defendant BRP argues that the existence of Plaintiff’s personal property on the real property is not sufficient to create inquiry notice.

A bona fide purchaser is one who acquires a title “in good faith, and for valuable consideration.” I.C. § 55-606. The Idaho Supreme Court has said “that one cannot be a good faith purchaser or encumbrancer when a reasonable investigation of the property would have revealed the existence of the conflicting claim in question.” *Langroise v. Becker*, 96 Idaho 218,

221 (1974). And the “general rule is that one purchasing property is put on notice as to any claim of title or right of possession which a reasonable investigation would reveal.” *Duff v. Seubert*, 110 Idaho 865, 870 (1985). Inquiry notice is “whatever is notice enough to excite the attention of a man of ordinary prudence and prompt him to further inquiry, amounts to notice of all such facts as a reasonable investigation would disclose.” *Hill v. Federal Land Bank*, 59 Idaho 136, 141 (1938).

Doyle Beck is an officer and owner of BRP. At his deposition, Mr. Beck said that he did not physically investigate the property at the time of the purchase from Mr. Clay because it was winter and he did not expect to find any personal goods on the property. Mr. Beck and BRP do not appear to have done any investigation into the quitclaim deed beyond relying on Mr. Clay and examining the tax assessment.

In her October 6, 2008 affidavit offered since the previous opinion was issued, Plaintiff testified that the house was full of personal goods including electronics, a television, clothes, pots and pans, and furniture. She also testified that her garbage was outside the home and in a fire pit.

Plaintiff argues that Defendant BRP’s failure to investigate does not excuse it of inquiry notice which would have occurred had BRP examined the property and seen signs of Plaintiff’s occupancy of the property. Plaintiff likens this situation to that in the Texas case of *Luck v. Welch*, 243 S.W.2d 589 (Tex.Civ.App. 1951) where a purchaser later objected to an encroaching roadway on his property. The court in *Luck* held that:

[A] purchaser of real estate is bound to take notice of such an apparent feature as clearly designated and marked roadway in absence of fraud. If appellant did not avail himself of the opportunity to inspect this land sufficiently to observe the existence of this road, he cannot take advantage of his own failure to do so.

*Id.* at 592.

Defendant rightly argues this case differs from *Luck*. In *Luck*, the plaintiff objected to the road itself; here Plaintiff argues that the presence of items and garbage should have lead to inquiry notice. However, the general rule of *Luck*—if a party fails to avail itself of the opportunity to inspect land sufficiently, it cannot take advantage of its failure to do so—applies equally in this situation. Had BRP investigated the property at any point, it would have seen that the house was not abandoned.

Defendant argues that the existence of Plaintiff's goods and garbage outside the home are not sufficient to "excite the attention of a man of ordinary prudence." Defendant does not offer any support for its claim that the existence of personal items on the property does not indicate the possibility of a competing claim. Rather, it appears that a reasonable party, upon seeing a house full of goods, would have questioned the availability of the property.

Defendant also argues that—despite knowing that Mr. Clay had recently exercised the quitclaim deed—had BRP investigated the property, it would have reasonably concluded that the pots and pans and women's clothing on the grounds belonged to Mr. Clay.

Here, Defendant BRP did not make any effort to investigate the property. A cursory investigation would have revealed that Plaintiff had not abandoned the property and would have excited the attention of a reasonable party to the possibility of a conflicting claim. There is no genuine issue of material fact as to BRP's status as a bona fide purchaser.

### III. DEFENDANT CLAY'S MOTION TO RECONSIDER

#### A. LEGAL STANDARD

Idaho Rule of Civil Procedure 11(a)(2)(B) provides the authority for a district court to reconsider and vacate interlocutory orders so long as final judgment has not yet been ordered. *Telford v. Mart Produce, Inc.*, 130 Idaho 932, 950 P.2d 1271 (1998). See also *Sammis v.*



*Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997) and *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994). "The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court." *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). See also *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992); *Slaathaugh v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999). On a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B), the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990); *Jordan*, 135 Idaho at 592, 21 P.3d at 914. A party filing a motion to reconsider pursuant to Rule 11(a)(2)(B) carries the burden of bringing to the trial court's attention the new facts. *Id.*; See also *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 879 P.2d 1135 (1994).

The Court in *Jordan* concluded that "the district court was provided with no new facts to create an issue for trial, and thus there was no basis upon which to reconsider its summary judgment order." *Id.* The Idaho Court of Appeals interpreted this holding in *Jordan* by stating:

[*Jordan*] does not stand for the proposition that a court given no new evidence with a motion for reconsideration has nothing to reconsider; it merely recognizes that if a trial court's conclusions were correct on the previous record, and it does not thereafter receive any information that would change its previous ruling, there is no basis for it to overturn its initial decision.

*Johnson v. Lambros*, 143 Idaho 468, 147 P.3d, 100, 105 (Ct. App. 2006). The failure to present new facts does not, of itself, preclude reconsideration. Rather, reconsideration is improper in the face of a lack of any new information that would alter a trial court's correct conclusions.

JAN 17 2009 MON 03:51 AM DOWNEYVILLE COUNTY IN RE: 2008-027-1000 1.000

## B. ANALYSIS

Defendant Clay filed a motion to reconsider on October 2, 2008, arguing that Plaintiff had failed to exercise her redemption rights. At the hearing for the motion on November 4, 2008, Defendant Clay appeared to abandon its previous position and requested that the court reconsider the previous finding that Defendant failed to honor Plaintiff's right of redemption and instead order a foreclosure sale if the court found that BRP was not a bona fide purchaser or to bifurcate the trial if the court found that BRP was a bona fide purchaser.

Defendant Clay relies on *Gem-Valley Ranches, Inc. v. Small*, 90 Idaho 354 (1966). In *Gem-Valley* the court found, as here, that a series of loans with property as a security was a mortgage and that the subsequent purchaser was not a bona fide purchaser. The court then set up a timetable for the defendants to pay the plaintiffs the money owing on the mortgage. *Id.* at 364. The Idaho Supreme Court reversed the trial court's determination and ordered a foreclosure sale pursuant to I.C. §§ 6-101,104. *Id.* at 368.

I.C. § 6-101(1) states "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate which action must be in accordance with the provisions of this chapter." Defendant argues that the August 22, 2008 opinion ignores I.C. § 6-101 and its requirement that any recovery for mortgages must consist solely of foreclosure sale. Defendant argues that without a foreclosure sale Plaintiff's right of redemption never arose and thus could not have been violated.

Plaintiff argues that a foreclosure sale would be inappropriate because neither defendant has brought a foreclosure action against Plaintiff and because the court may fashion equitable relief in this situation.

Plaintiff relies on *Chambers v. Thomas*, 123 Idaho 69 (1992) for the argument that equitable relief is appropriate in this situation. In *Chambers*, the trial court found that there was an equitable mortgage and, following the statute, ordered a foreclosure sale. However, the court made its determination in equity and used the legal remedy as a guideline. The Idaho Supreme Court held that the trial court's decision was appropriate and recognized that in cases of equitable mortgages "the usual order of sale in foreclosure cases is not required." *Id.* at 73. (quoting *Machold v. Farnan*, 20 Idaho 80 (1911)).

Plaintiff argues instead that the court should form an equitable remedy returning the property to the status it had before Clay's sale to BRP. This position begs the question, though, of what the next appropriate step would be following rescission of the sale to BRP.

In the court's earlier opinion finding that the quitclaim deed was a mortgage, the court relied upon I.C. § 45-904, as did Plaintiff. The *Chambers* opinion is not clear as to how the trial court determined the parties had an equitable mortgage. Here, the court found that the agreement between Kinghorn and Clay met the statutory requirements to form a mortgage and did not need to rely on any equitable determination.

An examination of *Gem-Valley* and the applicable foreclosure statutes make clear that a foreclosure sale is appropriate in this situation.

Defendant Clay is ordered to hold a foreclosure sale in compliance with the provisions of I.C. Title 6 Chapter 1.

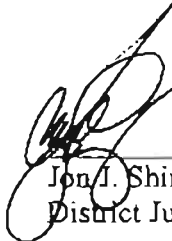
**IV.  
CONCLUSION**

Therefore, it is hereby ordered that Plaintiff's Motion for Partial Summary Judgment is GRANTED. Defendant BRP was not a bona fide purchaser of the property.

Defendant Clay's Motion for Reconsideration is GRANTED. Part B ("Right of Redemption") of the court's August 22, 2008 opinion and order on Plaintiff's Motion for Summary Judgment is vacated.

**IT IS SO ORDERED.**

Dated this 12 day of January, 2009.

  
\_\_\_\_\_  
Jon I. Shindurling  
District Judge

### CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_\_ day of January, 2009, I served a true and correct copy of the foregoing OPINION, DECISION, AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

#### Attorneys for Plaintiff

E.W. Pike  
Alan Johnston  
E. W. Pike & Associates  
151 N. Ridge Ave., Suite 210  
PO Box 2949  
Idaho Falls, ID 83403-2949

#### Attorneys for Defendant

Bryan D. Smith  
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Idaho Falls, ID 83405

Bradley J. Dixon  
Samia E. McCall  
Jennifer Reinhardt  
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Boise, ID 83702

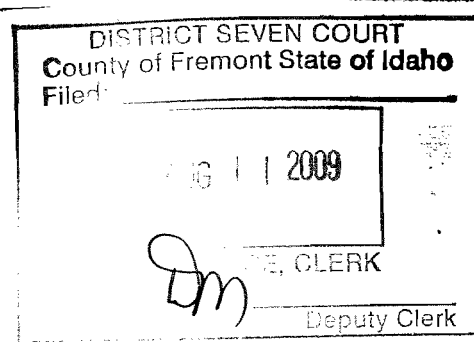
\_\_\_\_\_  
Clerk of the District Court  
Fremont County, Idaho

by

\_\_\_\_\_  
Deputy Clerk

Bryan D. Smith, Esq. – ISB #4411  
**SMITH, DRISCOLL & ASSOCIATES, PLLC**  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, Idaho 83405  
Telephone: (208) 524-0731  
Facsimile: (208) 529-4166

Attorneys for Defendant  
Kelly N. Clay



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP  
INCORPORATED, an Idaho corporation,  
and THE BANK OF COMMERCE, an  
Idaho Banking corporation,

Defendants.

Case No. CV-07-0306

**STIPULATION**

COMES NOW, the plaintiff, Krystal M. Kinghorn, f/k/a Krystal M. Barrett, by and through her counsel of record, Alan F. Johnston, Esq., of the firm of Pike & Associates, and defendant, Kelly N. Clay, by and through his attorney of record, Bryan D. Smith, Esq., of the firm of Smith, Driscoll & Associates, PLLC, and stipulate to the following:

1. The court has ordered the defendant, Kelly Clay, to hold a foreclosure sale.
2. Rather than hold a foreclosure sale where the plaintiff could purchase her property and/or subsequently redeem her property if the property were sold to a third

party, the parties agree that for reasons of efficiency and expediency, they can perform an accounting between themselves and convey the property to the plaintiff without the need to unnecessarily incur attorney's fees and costs associated with filing a foreclosure action and holding a foreclosure sale.

3. If at the end of the accounting the plaintiff owes the defendant, Kelly Clay, any money, the plaintiff must pay the defendant, Kelly Clay, the amount owed within six months of the determination of the amount owed or she agrees that the defendant, Kelly Clay, shall have no duty to convey her the property. If at the time plaintiff pays such money, an appeal is pending in this case, Kelly Clay agrees to hold the money in his attorney's trust account until the appeal is completed at which time the money shall be disbursed in light of any appellate ruling that impacts the accounting.

4. If at the end of the accounting the defendant, Kelly Clay, owes the plaintiff any money, defendant, Kelly Clay, shall pay the amount owed to plaintiff within 30 days or the plaintiff thereafter shall have judgment in the amount against defendant, Kelly Clay.

5. The accounting between the parties shall include any amount of attorney's fees and costs the court may award the parties. No accounting shall be complete before the court enters a decision on the issue of attorney's fees and costs as between plaintiff and Kelly Clay and a decision on any dispute between plaintiff and Kelly Clay on the accounting issue. The accounting shall be deemed complete 14 days after the court issues such decision on the attorney's fees, costs, and accounting issues.

6. The parties reserve their right to appeal any order of the court including, but not limited to, any award of attorney's fees and costs, if either chooses. In such

event, the accounting will be adjusted if the attorney's fees and/or costs are modified on appeal or if any other order affecting the accounting is modified on appeal.

7. The parties will file cross motions for summary judgment on the accounting issue each identifying the accounting items each contends should or should not be included as a credit and/or debit in connection with the reconveyance. After the court makes its determination as to which items shall be credited and/or debited in connection with the reconveyance as if the defendant, Kelly Clay, had held a foreclosure sale, the parties will apply the terms of this stipulation.

8. In connection with the court's determination, the parties agree on the following facts:

- a. On March 8, 2007, Kelly Clay paid the Bank of Commerce \$574.74 in connection with his having cosigned the loan for the plaintiff.
- b. On April 26, 2007, Kelly Clay paid Bank of Commerce \$19,246.01 in connection with his having cosigned the loan for the plaintiff.
- c. On April 26, 2007, Kelly Clay paid 2005 real property taxes on the subject property in the amount of \$165.47.
- d. On April 26, 2007, Kelly Clay paid 2006 real property taxes on the subject property in the amount of \$149.69.
- e. On April 26, 2007, Kelly Clay paid 2006 real property taxes on the subject property in the amount of \$86.95.
- f. On April 26, 2007, Kelly Clay paid 2006 mobile home property taxes on the subject property in the amount of \$137.98.



- g. On November 1, 2007, Kelly Clay paid 2007 mobile home property taxes on the subject property in the amount of \$70.00.
- h. On November 1, 2007, Kelly Clay paid 2007 real property taxes on the subject property in the amount of \$95.47.
- i. On January 8, 2008, BRP paid 2007 mobile home property taxes on the subject property in the amount of \$139.40. Kelly Clay has agreed to reimburse BRP for this amount.
- j. On January 8, 2008, BRP paid 2007 real property taxes on the subject property in the amount of \$31.86. Kelly Clay has agreed to reimburse BRP for this amount.
- k. On January 8, 2008, BRP paid 2007 real property taxes on the subject property in the amount of \$80.61. Kelly Clay has agreed to reimburse BRP for this amount.
- l. On February 12, 2008, BRP paid 2008 property insurance on the subject property in the amount of \$141.00. Kelly Clay has agreed to reimburse BRP for this amount.
- m. On July 11, 2008, BRP paid a 2007 subdivision road fee in the amount of \$75.00 and a subdivision water fee of \$105.00 on the subject property. Kelly Clay has agreed to reimburse BRP for this amount.
- n. On December 20, 2008, BRP paid 2007 real property taxes on the subject property in the amount of \$52.56. Kelly Clay has agreed to reimburse BRP for this amount.

o. On December 20, 2008, BRP paid 2008 real property taxes on the subject property in the amount of \$169.60. Kelly Clay has agreed to reimburse BRP for this amount.

p. On December 20, 2008, BRP paid 2008 real property taxes on the subject property in the amount of \$82.32. Kelly Clay has agreed to reimburse BRP for this amount.

q. On January 20, 2009, BRP paid a past due subdivision road fee in the amount of \$50.00 and a past due subdivision water fee of \$70.00 on the subject property. On this date, BRP also paid a 2008 or 2009 subdivision road fee in the amount of \$75.00 and a 2008 or 2009 water fee of \$105.00 on the subject property. Kelly Clay has agreed to reimburse BRP for this amount.

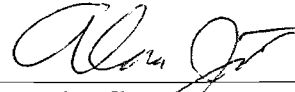
r. On March 23, 2009, Kelly Clay paid 2008 mobile home property taxes on the subject property in the amount of \$140.84.

9. The parties agree that for purposes of this stipulation the items Kelly Clay has agreed to reimburse BRP for shall be treated as though Kelly Clay paid them himself.

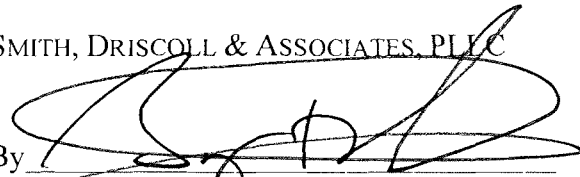
10. In summary, Kelly Clay has paid the Bank of Commerce \$19,820.75 and \$846.40 in property taxes. BRP has paid \$556.35 in property taxes, \$141 in insurance, \$200 in subdivision road fees, and \$280 in subdivision water fees. Kelly Clay has agreed to reimburse BRP for the property taxes, insurance, road fees, and water fees BRP has paid and such payments shall be treated as though Kelly Clay has paid these items for purposes of this stipulation.

DATED this 6 day of <sup>August</sup>~~July~~, 2009.

PIKE & ASSOCIATES, P.A.

By   
Alan F. Johnston  
Attorneys for Plaintiff

SMITH, DRISCOLL & ASSOCIATES, PLLC

By   
Bryan D. Smith  
Attorneys for Defendant  
Kelly N. Clay

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7<sup>th</sup> day of August, 2009, I caused a true and correct copy of the foregoing **STIPULATION** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

E.W. Pike, Esq.  
Alan Johnston, Esq.  
E.W. Pike & Associates  
151 N. Ridge Ave., Suite 210  
Idaho Falls, ID 83403-2949

☒ U. S. Mail  
☐ Fax  
☐ Overnight Delivery  
☐ Hand Delivery

Bradley J. Dixon, Esq.  
Samia E. McCall, Esq.  
Stoel Rives, LLP  
101 South Capitol Boulevard,  
Suite 1900  
Boise, ID 83702

☒ U. S. Mail  
☐ Fax  
☐ Overnight Delivery  
☐ Hand Delivery

  
Bryan D. Smith

Bryan D. Smith, Esq. - ISB #4411  
SMITH, DRISCOLL & ASSOCIATES, PLLC  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, Idaho 83405  
Telephone: (208) 524-0731  
Facsimile: (208) 529-4166

Attorneys for Defendant  
Kelly N. Clay

7TH JUDICIAL DISTRICT COURT  
BONNEVILLE COUNTY IDAHO

9 SEP 10 10:08

FILED IN CHAMBERS  
AT IDAHO FALLS  
BONNEVILLE COUNTY  
HONORABLE JON J. SHINDURLING  
DATE Sept 10 2009  
TIME 9:08 AM  
DEPUTY CLERK Lucie Walton

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

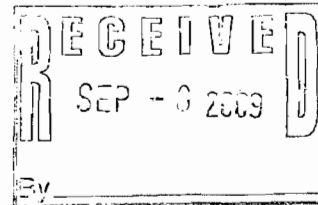
v.

KELLY N. CLAY, an individual, BRP  
INCORPORATED, an Idaho corporation,  
and THE BANK OF COMMERCE, an Idaho  
Banking corporation,

Defendants.

Case No. CV-07-0306


**ORDER**



THIS MATTER having come on regularly for a status conference before the  
Honorable Jon J. Shindurling, District Judge on August 24, 2009, with plaintiff, Krystal  
M. Kinghorn, appearing by and through Alan Johnston, Esq., of the firm of Pike &  
Associates, defendant, Kelly N. Clay, appearing by and through Bryan D. Smith, Esq., of  
the firm Smith, Driscoll & Associates, PLLC; and defendant BRP Incorporated,  
appearing telephonically by and through Jennifer M. Reinhardt, Esq., of the firm Stoel  
Rives, LLP, and the Court having reviewed its files, considered oral arguments from  
counsel, and otherwise being fully advised on the premises;

IT IS HEREBY ORDERED that BRP shall convey to Kelly Clay the real property described in the Warranty Deed attached as Exhibit "A."

MADE AND ENTERED this \_\_\_\_ day of August, 2009.

  
\_\_\_\_\_  
Jon J. Stauderling  
DISTRICT JUDGE



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of <sup>Sept</sup> ~~August~~, 2009, I caused a true and correct copy of the foregoing **ORDER** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

E.W. Pike, Esq.  
Alan Johnston, Esq.  
E.W. Pike & Associates  
151 N. Ridge Ave., Suite 210  
Idaho Falls, ID 83403-2949

☒ U. S. Mail  
☐ Fax  
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☐ Hand Delivery

Bryan D. Smith, Esq.  
Smith, Driscoll & Associates, PLLC  
P. O. Box 50731  
Idaho Falls, ID 83405-0731

☒ U. S. Mail  
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☐ Hand Delivery

Bradley J. Dixon, Esq.  
Samia E. McCall, Esq.  
Stoel Rives, LLP  
101 South Capitol Boulevard,  
Suite 1900  
Boise, ID 83702

☒ U. S. Mail  
☐ Fax  
☐ Overnight Delivery  
☐ Hand Delivery

Shane Webster  
Clerk

# Exhibit “A”



3040725 727KL

ALLIANCE TITLE &amp; ESCROW

P.O. BOX 732  
REXBURG, ID 83440WARRANTY DEED

GRANTOR, Kelly N. Clay, a single man, of 4470 N. 25<sup>th</sup> East, Idaho Falls, County of Bonneville, State of Idaho, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, does hereby GRANT, BARGAIN, SELL and CONVEY unto BRP, Inc., an Idaho corporation, whose mailing address is P.O. Box 1768, Idaho Falls, Idaho 83403 as GRANTEE, and to grantee's heirs and assigns forever, all of the described real estate located in Fremont County, Idaho: See Exhibit "A".

TOGETHER with all improvements, water, water rights, ditches, ditch rights, easements, tenements, hereditaments and appurtenances thereto.

Grantor, for himself, his heirs and assigns does hereby covenant, warrant and shall defend the quiet and peaceable possession of said promises by the grantee, his heirs and assigns forever against the claims of all persons.

IN WITNESS WHEREOF, Grantor has hereunto subscribed his name to this instrument this 23 day of April, 2007.

*Kelly N. Clay*  
Kelly N. Clay

509633

Microfilm No. 3 Day May 07  
At 4:45 O'clock P M  
ABBE MACE  
FREMONT CO. RECORDER  
Fee \$ 7.00 Deputy  
ALLIANCE TITLE & ESCROW

STATE OF IDAHO )

509833

County of Bonneville )

) ss.

On this 23 day of April, 2007, before me, a Notary Public for Idaho, personally appeared Kelly N. Clay, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal the day and year first above written.

Mark R. Fulmer  
Notary Public for Idaho  
Residing at: Idaho Falls  
My Commission Expires: 06-04-09

DEC. 8, 2005 8:25PM BANK OF COMMERCE NORTHGATE

NO. 91E P. 9/9

509603

## EXHIBIT "A"

PARCEL 1: Lot 15, Block 6, Buffalo River Estates Division No. 2, Fremont County, Idaho, as per the recorded plat thereof

## PARCEL 2:

A parcel of land in the NE¼ of Section 23, Township 13 North, Range 43, East of the Boise Meridian, lying South of and adjacent to the South lines of Buffalo River Estates, Division #2, Fremont County, Idaho, described as follows:

Beginning at the Southeast corner of Lot 15, Block 6 of Buffalo River Estates, Division #2;

Thence South 89° 44' 48" West, 160.58 feet to the Southwest corner of said Lot 15;

Thence South 0° 15' 12" East, 118.39 feet to a point of curve with a radius of 30.00 feet;

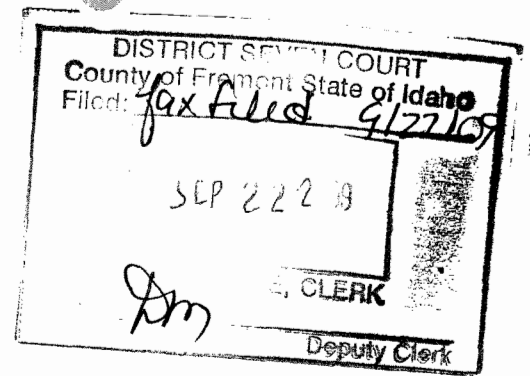
Thence to the left along said curve 47.24 feet through a central angle of 90° 13' 42";

Thence North 89° 44' 48" East, 71.05 feet;

Thence North 0° 15' 12" West, 148.51 feet TO THE POINT OF BEGINNING.

Bradley J. Dixon, ISB No. 6167  
 Email: [bjdixon@stoel.com](mailto:bjdixon@stoel.com)  
 Jennifer M. Reinhardt, ISB No. 7432  
 Email: [jmreinhardt@stoel.com](mailto:jmreinhardt@stoel.com)  
 STOEL RIVES LLP  
 101 S. Capitol Boulevard, Suite 1900  
 Boise, Idaho 83702  
 Telephone: (208) 389-9000  
 Fax Number: (208) 389-9040

Attorneys for Defendant BRP, Incorporated



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
 KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP,  
 INCORPORATED, an Idaho corporation,  
 and THE BANK OF COMMERCE, an  
 Idaho Banking corporation,

Defendants.

BRP INCORPORATED, an Idaho  
 corporation,

Cross-Claimant,

v.

KELLY N. CLAY, an individual,

Cross-Defendant.

Case No. CV-07-0306

**BRP, INC.'S CROSS-CLAIM AGAINST  
 KELLY CLAY FOR BREACH OF THE  
 WARRANTY DEED**

COMES NOW, Defendant BRP, Incorporated ("BRP"), by and through its attorneys of record, Stoel Rives LLP, and hereby reasserts and realleges all of the matters, including denials and affirmative defenses, set forth in its Answer to Plaintiff's Complaint, and hereby asserts the following Cross-Claim against Kelly N. Clay (hereinafter "Clay") as follows:

### **I. PARTIES**

1. BRP, at all times relevant hereto, was and now is a corporation organized under the laws of Idaho and authorized to do business in the state of Idaho.
2. Clay, at certain relevant times, was a resident, and is presently a resident, of Idaho Falls, Idaho.
3. Venue is proper in this Court because Clay is subject to personal jurisdiction in this County.
4. On May 31, 2007, the Plaintiff filed her Amended Complaint in the instant action.

### **II. CLAIM FOR RELIEF**

#### **COUNT 1 BREACH OF WARRANTY DEED**

5. BRP realleges each and every preceding paragraph and incorporates the same by reference herein.
6. On April 23, 2007, Clay sold the Property, that is the subject of this litigation and which is located at 4058 Steelhead Drive, Island Park, Freemont County, State of Idaho, to BRP for the amount of \$30,000.
7. At the time that Clay sold the Property to BRP, Clay provided BRP, Inc. with a Warranty Deed dated April 23, 2007, in which Clay warranted that the Property was free from claims of all persons.

8. At the time the Property was sold to BRP according to the ruling of the Court in the above captioned matter, the title was not free and clear of claims of all other persons.

9. As a direct and proximate result of Clay's breach of the Warranty Deed, BRP has sustained injury and damage, in an amount according to proof.

### III. ATTORNEY FEES

As a consequence of the Cross-claim stated herein, BRP has been required to retain the law firm of Stoel Rives LLP, and has incurred and will incur costs and reasonable attorneys fees related thereto, for which BRP is entitled to a separate award of reasonable costs and attorneys' fees pursuant to Idaho Code §§ 12-120(3) and 12-121, and other applicable law.

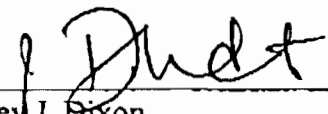
### IV. PRAYER FOR RELIEF

WHEREFORE, BRP prays for judgment against Clay as follows:

1. For an award of damages as set forth herein,
2. An award of Attorney fees under applicable Idaho law including but not limited to Idaho Code § 12-120 and Idaho Rule of Civil Procedure 54 incurred in this matter;
3. An award of costs incurred in defending this matter; and
4. For such other and further relief as this court deems just and equitable.

DATED: September 22, 2009.

STOEL RIVES LLP

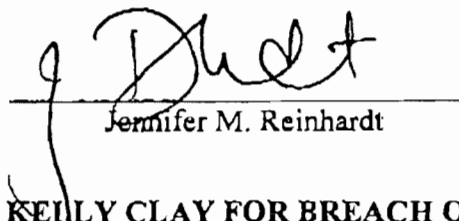
  
\_\_\_\_\_  
Bradley J. Dixon  
Jennifer M. Reinhardt  
Attorney for Defendant BRP, Incorporated

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of September, 2009, I served a true and correct copy of the foregoing **BRP, INC.'S CROSS-CLAIM AGAINST KELLY CLAY FOR BREACH OF THE WARRANTY DEED** by the method indicated below, addressed to the following:

|   |  |
|---|--|
| Jon J. Shindurling<br>District Judge<br>Bonneville County District Court<br>605 N. Capital Avenue<br>Idaho Falls, ID 83402  | Via U.S. Mail  |
| E.W. Pike<br>Erika Lessing<br>E.W. PIKE & ASSOCIATES, P.A.<br>151 N. Ridge Ave., Suite 210<br>PO Box 2949<br>Idaho Falls, ID 83403<br>Facsimile: 208-528-6447<br><i>Attorneys for Plaintiff</i>         | <input type="checkbox"/> Via U.S. Mail<br><input checked="" type="checkbox"/> Via Facsimile<br><input type="checkbox"/> Via Overnight Mail<br><input type="checkbox"/> Via Hand Delivery |
| Bryan D. Smith<br>SMITH, DRISCOLL & ASSOCIATES<br>414 Shoup Avenue<br>PO Box 50731<br>Idaho Falls, ID 83405<br>Facsimile: 208-529-4166<br><i>Attorney for Defendant Kelly Clay</i>                      | <input type="checkbox"/> Via U.S. Mail<br><input checked="" type="checkbox"/> Via Facsimile<br><input type="checkbox"/> Via Overnight Mail<br><input type="checkbox"/> Via Hand Delivery |
| Douglas R. Nelson<br>Brian T. Tucker<br>Anderson Nelson Hall Smith, P.A.<br>490 Memorial Drive<br>Post Office Box 51630<br>Idaho Falls, ID 83405<br><i>Attorneys for Defendant The Bank of Commerce</i> | <input type="checkbox"/> Via U.S. Mail<br><input checked="" type="checkbox"/> Via Facsimile<br><input type="checkbox"/> Via Overnight Mail<br><input type="checkbox"/> Via Hand Delivery |

By:



Jennifer M. Reinhardt

**M AGAINST KELLY CLAY FOR BREACH OF THE**

Bryan D. Smith, Esq. – ISB #4411

**SMITH, DRISCOLL & ASSOCIATES, PLLC**

414 Shoup Ave.

P.O. Box 50731

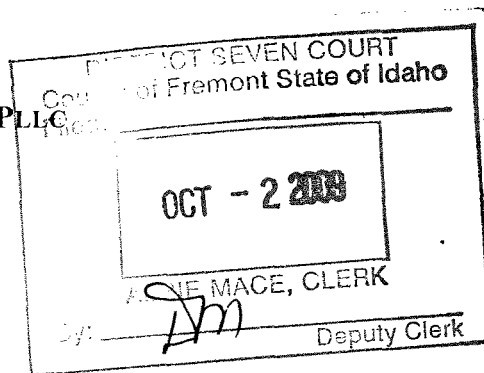
Idaho Falls, Idaho 83405

Telephone: (208) 524-0731

Facsimile: (208) 529-4166

Attorneys for Defendant

Kelly N. Clay



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP  
INCORPORATED, an Idaho corporation,  
and THE BANK OF COMMERCE, an  
Idaho Banking corporation,

Defendants.

BRP INCORPORATED, an Idaho  
Corporation,

Cross-Claimant,

v.

KELLY N. CLAY, an individual,

Cross-Defendant.

Case No. CV-07-0306

**REPLY TO BRP, INC.'S CROSS-  
CLAIM AGAINST KELLY CLAY  
FOR BREACH OF THE WARRANTY  
DEED**

COMES NOW, the Defendant and Cross-Defendant, Kelly N. Clay, hereinafter

("Cross-Defendant"), by and through his attorney of record, Bryan D. Smith, Esq., of the



firm of Smith, Driscoll & Associates, PLLC, and in response to the Cross-Claim filed by BRP, Inc, admit, denies, states, and alleges as follows:

FIRST DEFENSE

1. Cross-Claimant's Crossclaim fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

2. Cross-Defendant denies each and every allegation set forth in said Crossclaim except as expressly admitted herein.

THIRD DEENSE

3. In answer to paragraphs 1, 2, 3, and 4 of Cross-Claimant's Crossclaim, Cross-Defendant admits the same.

COUNT 1

4. In answer to paragraph 5, Cross-Defendant realleges his answers to paragraphs 1-4 of Cross-Claimant's Crossclaim as though the same were set forth in full herein.

5. In answer to paragraphs 6, 7, 8, and 9 of Cross-Claimant's Crossclaim, Cross-Defendant admits the same.

6. In answer to paragraph III, Attorney Fees of Cross-Claimant's Crossclaim, Cross-Defendant denies the same.

WHEREFORE, Cross-Defendant respectfully requests the following judgment:

1. That the Cross-Defendant have and recover his costs and reasonable attorney's fees incurred in this action; and

2. That the Court grant such other and further relief as appears just and equitable.

DATED this 28<sup>th</sup> day of September, 2009.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By 

Bryan D. Smith  
Attorneys for Defendant  
Kelly N. Clay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of September, 2009, I caused a true and correct copy of the foregoing **REPLY TO BRP, INC.'S CROSS-CLAIM AGAINST KELLY CLAY FOR BREACH OF THE WARRANTY DEED** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

E.W. Pike, Esq.  
Alan Johnston, Esq.  
E.W. Pike & Associates  
151 N. Ridge Ave., Suite 210  
Idaho Falls, ID 83403-2949  
*Attorneys for Plaintiff*

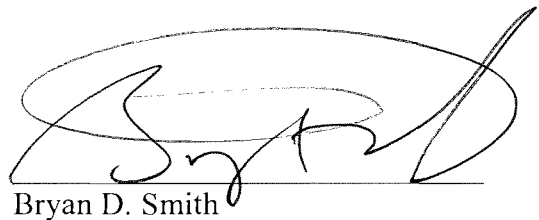
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Bradley J. Dixon, Esq.  
Samia E. McCall, Esq.  
Stoel Rives, LLP  
101 South Capitol Boulevard,  
Suite 1900  
Boise, ID 83702  
*Attorneys for Defendant BRP,  
Incorporated*

☒ U. S. Mail  
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☐ Hand Delivery

Douglas R. Nelson  
Brian T. Tucker  
Anderson Nelson Hall Smith, P.A.  
490 Memorial Drive  
Post Office Box 51630  
Idaho Falls, ID 83405  
*Attorneys for Defendant The Bank of  
Commerce*

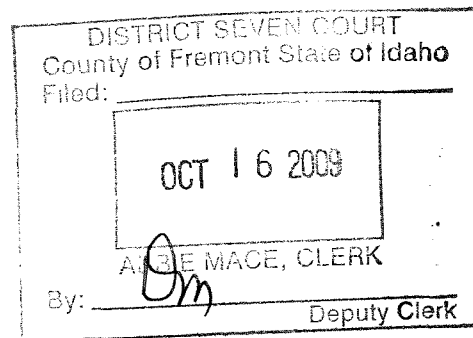
☒ U. S. Mail  
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Bryan D. Smith

Bryan D. Smith, Esq. – ISB #4411  
**SMITH, DRISCOLL & ASSOCIATES, PLLC**  
414 Shoup Ave.  
P.O. Box 50731  
Idaho Falls, Idaho 83405  
Telephone: (208) 524-0731  
Facsimile: (208) 529-4166

Attorneys for Defendant



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP  
INCORPORATED, an Idaho corporation, and  
THE BANK OF COMMERCE, an Idaho  
Banking corporation,

Defendants.

Case No. CV-07-0306

**MOTION FOR SUMMARY JUDGMENT**

COMES NOW the defendant, Kelly N. Clay, by and through his counsel of record, Bryan D. Smith, Esq., of the firm Smith, Driscoll & Associates, PLLC, and moves the Court pursuant to I.R.C.P. 56 and the Stipulation entered into on August 6, 2009 for an order granting summary judgment in favor of defendant, Kelly N. Clay on the following issues:

1. Kinghorn must reimburse Clay \$21,844.50 for repayment of the loan and maintenance of the property;
2. Kinghorn must pay Clay \$6,447.32 in interest on the money Clay has paid as a result of Kinghorn's default; and

3. Clay is entitled to attorney's fees in the amount of \$7,339.50 from Kinghorn as provided in the Loan Guarantee Agreement.

This motion is made on the grounds that there is no genuine issue of material fact which must be decided and that defendant, Kelly N. Clay, is entitled to a judgment in the above-entitled action as a matter of law.

This motion is based upon this Motion, the Notice of Hearing, the Brief in Support of Motion Summary Judgment, the Affidavit of Bryan D. Smith and upon the court files and records herein.

Defendant requests oral argument on said motion.

DATED this 9th day of October, 2009.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

Bryan D. Smith  
Attorneys for Defendant

### CERTIFICATE OF SERVICE

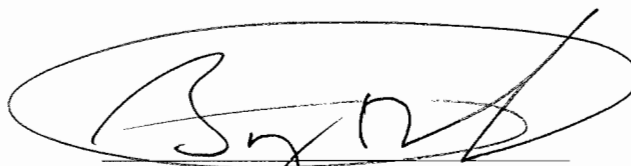
I HEREBY CERTIFY that on this 9th day of October, 2009, I caused a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

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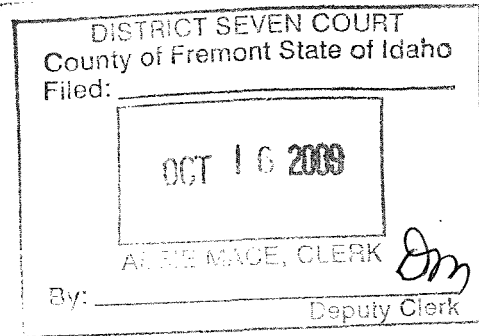
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP  
INCORPORATED, an Idaho corporation, and  
THE BANK OF COMMERCE, an Idaho  
Banking corporation,

Defendants.

Case No. CV-07-0306

**BRIEF IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

I. INTRODUCTION.

On August 6, 2009, plaintiff, Krystal M. Kinghorn, and defendant, Kelly N. Clay, stipulated that they would perform an accounting between themselves and convey the property without the need of holding a foreclosure sale. The parties further stipulated that they would file cross motions for summary judgment on the accounting issues and allow the court to determine the items that should be charged to each party in connection with the reconveyance as if defendant, Kelly Clay, had held a foreclosure sale.

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II. KINGHORN MUST REIMBURSE CLAY FOR THE EXPENSES HE HAS INCURRED AS A RESULT OF KINGHORN'S DEFAULTING ON THE LOAN GUARANTEE AGREEMENT.

Idaho law provides that a party may obtain a deficiency judgment against a party to allow recovery of the costs of a foreclosure sale. *See* I.C. §§ 6-108 and 45-1512. Idaho Code Section 45-1512 allows a party to obtain a deficiency judgment for the balance due after a non-judicial foreclosure sale has been held. That section allows a party to collect interest, costs of sale, and attorney's fees. I.C. § 45-1512. Courts have also held that the section 45-1512 must be construed together with the other sections of the act relating to deeds of trust. *Frontier Federal Sav. and Loan Ass'n v. Douglass*, 123 Idaho 808, 811 (1993). That court, citing I.C. § 45-21506(12), stated that the amount a party can recover as a result of a foreclosure sale "may include such items as taxes, assessments, premiums for insurance or advances made by a beneficiary in accordance with the terms of the deed of trust" *Id. at 814* (citations omitted). Alternatively, Idaho Code Section 6-108 provides that a deficiency judgment after a judicial foreclosure sale may include the "costs of foreclosure and sale." I.C. § 6-108.

Clay and Kinghorn have stipulated and agreed that the following sums have been paid in connection with underlying transactions and subsequent default.

- a. On March 8, 2007, Kelly Clay paid the Bank of Commerce \$574.74 in connection with his having cosigned the loan for the plaintiff.
- b. On April 26, 2007, Kelly Clay paid Bank of Commerce \$19,246.01 in connection with his having cosigned the loan for the plaintiff.
- c. On April 26, 2007, Kelly Clay paid 2005 real property taxes on the subject property in the amount of \$165.47.



- d. On April 26, 2007, Kelly Clay paid 2006 real property taxes on the subject property in the amount of \$149.69.
- e. On April 26, 2007, Kelly Clay paid 2006 real property taxes on the subject property in the amount of \$86.95.
- f. On April 26, 2007, Kelly Clay paid 2006 mobile home property taxes on the subject property in the amount of \$137.98.
- g. On November 1, 2007, Kelly Clay paid 2007 mobile home property taxes on the subject property in the amount of \$70.00.
- h. On November 1, 2007, Kelly Clay paid 2007 real property taxes on the subject property in the amount of \$95.47.
- i. On January 8, 2008, BRP paid 2007 mobile home property taxes on the subject property in the amount of \$139.40. Kelly Clay has agreed to reimburse BRP for this amount.
- j. On January 8, 2008, BRP paid 2007 real property taxes on the subject property in the amount of \$31.86. Kelly Clay has agreed to reimburse BRP for this amount.
- k. On January 8, 2008, BRP paid 2007 real property taxes on the subject property in the amount of \$80.61. Kelly Clay has agreed to reimburse BRP for this amount.
- l. On February 12, 2008, BRP paid 2008 property insurance on the subject property in the amount of \$141.00. Kelly Clay has agreed to reimburse BRP for this amount.
- m. On July 11, 2008, BRP paid a 2007 subdivision road fee in the amount of \$75.00 and a subdivision water fee of \$105.00 on the subject property. Kelly Clay has agreed to reimburse BRP for this amount.